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Performing Discretion or Performing Discrimination: An Analysis of Race and Ritual in Batson Decisions in Capital Jury Selection

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PERFORMING DISCRETION OR PERFORMING DISCRIMINATION: RACE, RITUAL, AND PEREMPTORY CHALLENGES IN CAPITAL JURY SELECTION

Melynda J. Price*

Research shows the mere presence of Blacks on capital juries—on the rare occasions they are seated—can mean the difference between life and death. Peremptory challenges are the primary method to remove these pivotal participants. Batson v. Kentucky developed hearings as an immediate remedy for the unconstitutional removal of jurors through racially motivated peremptory challenges. These proceedings have become rituals that sanction continued bias in the jury selection process and ultimately affect the outcome of capital trials. This Article deconstructs the role of the Batson ritual in legitimating the removal of African American jurors. These perfunctory hearings fail to meaningfully interrogate the reasons prosecutors offer as race neutral motivations for peremptorily striking Black jurors.

In my examination of “race neutral” removals in Texas courts, I demonstrate how the focus on form has failed to solve the substantive problem of racially discriminatory uses of peremptory challenges. Cases from these courts have been critical in the Supreme Court jurisprudence that developed the process for deciphering racially motivated uses of this legal tool. Although Batson hearings have proven to be a weak legal instrument, they nevertheless repeatedly remind us of the persistence of racially discriminatory uses of peremptory challenges and the failure of current measures to prevent such discrimination. Building on the suggestion by Akhil Amar to “preempt peremptories,” this Article calls for the reexamination of the use of this practice, particularly in capital trials, in a justice system that purports interest in protecting that system from racial discrimination.

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INTRODUCTION

This Article originates in my long fascination with the jury in the American criminal justice system. The popular mystique of the jury could be attributed to classic cinematic portrayals of jury deliberations in films like *12 ANGRY MEN* where the jurors painstakingly excavate their individual biases and human weaknesses while deliberating in a criminal trial.¹ In early viewings, the complexity of the interactions during the deliberations dominated my understanding of the film. As a scholar whose interests now are in the fairness of criminal proceedings and outcomes, I find myself wanting the magic of motion pictures to return us to the part of the story where this jury was selected. What were the responses of these jurors during voir dire? Or the responses of those members of the panel removed for cause? What instincts or lessons learned in the lawyers’ practical experience led to the removal of those excused using peremptory challenges?²

1. *12 ANGRY MEN* (United Artists 1957).

2. Peremptory challenges are a tool that allows litigants to remove jurors for motivations for “which no reason need be given or cause assigned.” 47 AM. JUR. 2D *Jury* § 206 (2009) (“While challenges for cause permit rejection of jurors on a narrowly specified,

Although 12 ANGRY MEN intentionally refuses to locate the film in any particular urban landscape or identify the nationality or ethnicity of the defendant, the characters' accents and demeanor suggest a provenance quite different from other films of this period that also portray all-White, all-male juries situated in the South.³ This second image of the jury also symbolizes the American criminal justice system and, it should be noted, is one where there is rarely, if ever, a depiction of deliberation. But the appearance of this Southern jury—frequently with at least one member in bib overalls—has come to represent clear and unfettered bias in legal decision making. This stands in contrast to the 12 ANGRY MEN jury, which portrays individuals struggling to overcome bias and limited vision to get to the Truth.

Fiction filmmakers, however, possess a power rarely available to practitioners and scholars. They have the ability to peer into the deliberative process—a process whose legal impenetrability has been reinforced by the Supreme Court.⁴ Though insight into the deliberative process would be incredibly helpful in understanding how juries decide cases, the rest of the record has yet to be exhausted of its analytical contribution to our understanding of the articulation and practice of racial discrimination in choosing this key component of criminal trials—the jury. In capital cases, the jury is an even more important and litigated issue than other areas of criminal law. Furthermore, the racial composition of capital juries can mean the difference between life and death for certain defendants. Research conducted by the Capital Jury Project (“CJP”) demonstrates that

provable, and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.”).

3. I use nationality and ethnicity because although the early minutes of the film offer a shadowy glimpse of a seemingly White defendant, clear attempts by a number of the jurors to “other” the defendant parallel portrayals of race and racial minorities in criminal cases. The image of the Southern jury tends to be more racialized—for both the jurors and the defendants—than the image in 12 ANGRY MEN, despite the fact that both are depictions of juries that are all White and all male. Similar questions can be deployed in both instances about inclusivity and discrimination in the selection process. The Southern jury, however, is a relevant counterpoint in this analysis because of the racial and regional history of capital punishment. The arguments herein demonstrate that it is difficult to sever this connection, even in contemporary analysis.

4. The United States Supreme Court has reinforced the barriers that prevent attorneys and others to interrogate jurors post-verdict. In *Tanner v. United States*, evidence of drug abuse and drug dealing among jurors during deliberations surfaced after the verdict. *Tanner v. United States*, 483 U.S. 107, 122 (1987). Justice O'Connor argued despite the presence of illegal drugs “and their improper use, drugs or alcohol voluntarily ingested by a juror seems no more an ‘outside influence’ than a virus, poorly prepared food, or a lack of sleep.” *Id.* at 124–25. For the *Tanner* majority, the restriction of all deliberations to the jury, without any third party post-trial intrusion, is part of the strength of the American jury system. *Id.* Post-trial investigations into how jury decisions are made undermine this system. *Id.* at 127. The commitment to secrecy, the inability to interrogate jurors concerning jury decisions, and popular imagery together make jury deliberations the least understood aspect of the trial process.

the mere presence of one Black male on capital juries with a Black defendant and a White victim makes a jury nearly twice as likely to give life sentences.⁵ The profound nature of the punishment meted out by juries in capital cases has made understanding the factors that influence outcomes a large area of theoretical and empirical research on the death penalty.⁶ These studies provide significant insight into how capital juries make decisions and the role of race in these decisions, but they are necessarily off the record and are frequently post hoc.

This Article focuses on *Batson* hearings, which are explicit attempts to ensure that parties do not discriminate on the basis of race when selecting juries and to prevent or correct any race-based discrimination at the point it occurs.⁷ *Batson* hearings take place within the jury selection process, which is by its very nature discriminating.⁸ Of interest here is the method by which courts police the limits imposed on the selection process by *Batson v. Kentucky*. By bringing together research from scholarship in legal, social science and cultural studies, this Article explores the multiple meanings of interactions between state and citizen in this legal moment, and seeks to demonstrate the continuation of racial discrimination and the impact of that discrimination on the outcome of capital trials.

This Article argues that it is time to re-think *Batson* hearings and ultimately, the utility of peremptory challenges. *Batson* hearings are unique, not only in law, but also in the state's administration of its duties. They represent one of the few places where a representative of the state is required to stop in the act of doing his or her job and explain how he or she has done that job in a race neutral manner. This Article maintains that this repetitive event in criminal trials, particularly capital trials, with their consistent structure and transmission of the state's views of who should participate in the finding of guilt or innocence and the determination of

5. Capital juries with one or more Black males on the jury gave life sentences in 71.9% of cases with a Black defendant and a White victim as opposed to juries with no Black males, which gave life sentences in 37.5% of cases. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jury Racial Composition and the Juror's Race*, 3 U. PA. J. CONST. L. 171, 193 (2001).

6. The best example of this line of research comes from the CJP, which has analyzed decision making among capital jurors since 1991. Capital Jury Project, <http://www.albany.edu/scj/CJPwhat.htm> (last visited Sept. 4, 2008). The CJP has conducted over 1,200 interviews with jurors in capital cases in over 350 cases across 14 states including Texas. The data from this project has spawned more than 30 articles. Additionally, the CJP's work on death qualification is a good example that is quite relevant to this analysis. See, e.g., *Hovey v. Superior Court of Alameda County*, 616 P.2d 1301, 1314-41 (1980) (discussing various studies on death qualification).

7. *Batson v. Kentucky*, 476 U.S. 79, 93-95 (1986).

8. By discriminating, I am referring to the need to whittle large numbers of citizens into a twelve person deliberative body, which requires some value judgments about eligibility and desirability for service.

life or death, should be understood in terms of ritual more than legal meaning. The legal meaning of these hearings is debatable because of the extremely low evidentiary standard the state must meet to show a lack of bias. These hearings are more a ritual than an effective legal instrument to combat improper selection of juries because the state's performance of the process is more important than the actual selection of a jury without discrimination. The ritual of the *Batson* hearing perpetuates a veneer of racial inclusion that is substantively false.

In actuality, *Batson* objections and hearings do not remedy racially discriminatory jury practices. They instead erect a process that masks the state's continuing discrimination in the use of peremptory challenges. Initially, this unique performance by the state, meant to ensure that litigants do not use peremptory challenges in a racially discriminatory manner, appeared to be a progressive and immediate remedy for constitutional violations. However, courts' lack of meaningful investigation into prosecutorial motives during *Batson* hearings means that everything short of an explicitly racial statement—e.g., “I do not want this juror because they are black”—is upheld as race neutral reasoning for exclusion.⁹ This leads to the question, “If *Batson* challenges are not doing what they have been created to do—that is, prevent the removal of potential jurors because of their race—what work may they actually be doing?” The answer this Article offers is that *Batson* hearings allow for the appearance of fairness while requiring little work on the part of courts and prosecutors to alter biased practices.

The state points to these hearings as visible examples of efforts to combat discrimination in jury selection. This Article questions the underlying validity of these proceedings, given that they do not change the fact that peremptory challenges lead to fewer Blacks on capital juries.¹⁰ This

9. The lack of meaningful investigation is evinced by the fact that in the first decade after *Batson*, the Court of Criminal Appeals only overturned one case involving the racially motivated use of peremptory challenges. See *Chambers v. Texas*, 742 S.W.2d 695 (Tex. Crim. App. 1988). It is not clear that the Court always intended such a low threshold to exist in evaluating race neutral reasons offered by prosecutors. However, with the decision in *Hernandez v. New York*, the Court established two points that are important to later evaluations of *Batson* claims. *Hernandez v. New York*, 500 U.S. 352, 372 (1991). First, the standard for a prosecutor to make a showing of race neutrality, as required to overcome claims of bias, is low. *Id.* at 360. Second, demonstrating that peremptory challenges disproportionately impact a single group is not necessarily enough to give rise to an inference of discrimination. *Id.* at 362.

10. One review of capital cases from the mid to late 1970s in Florida showed patterns of racial discrimination in peremptory challenges. Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 43–44 (1982). Studies in other states showed similar results. See generally David Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials*, 3 U. PA. J. CONST. L. 3, 10 (2001); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 697 (1999); Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution*

Article first offers a close reading of *Batson* decisions in the Texas Court of Criminal Appeals (“CCA”).¹¹ By examining African Americans’ voir dire responses and prosecutors’ interpretations of those responses, this Article demonstrates that racial discrimination and race neutrality have become indistinguishable in *Batson* cases. Going through the motions of *Batson* hearings alone allows the state to give criminal proceedings the imprimatur of fairness while legitimating the removal of African American jurors. The Article then argues against the continued use of peremptory challenges as a true step toward ending the discrimination that *Batson* hearings claim to address.

The Article begins in Part I with a discussion of how the seating of African Americans on capital juries significantly affects the outcome of capital cases. Part II outlines the Supreme Court’s adjudication of the use of race in the jury selection process and discusses other structural issues that impede African American representation in jury pools and participation in trial juries. This section also explores the decisions that led to the development of the *Batson* hearing and the current constitutional understanding of how to review claims of racial discrimination in the use of peremptory challenges. Part III maps the legal landscape on which the ritual of the *Batson* hearing is created using theories from cultural studies and speculates on the messages and values communicated by the performances of prosecutors and African American members of the venire in *Batson* hearings. Part IV discusses the methodological approach to case selection and describes the data, which are drawn primarily from the Texas CCA.¹² Part V then deconstructs the practical implications of the *Batson* ritual. Next, Part VI directly addresses the way discriminatory uses of peremptory challenges act as a co-conspirator, together with the re-

and Defense Agree?, 14 J. CRIM. JUST. 61, 63 (1986); Holly Becka, Steve McGonigle, Tim Wyatt & Jennifer La Fleur, *Disputed Practice Still a Courtroom Fixture; Peremptory Challenges Survive Calls for Reform, Decades of Controversy*, DALLAS MORNING NEWS, Jan. 24, 2006, <http://www.dallasnews.com/sharedcontent/dws/news/longterm/stories/082305dnprojurystrikes.d5c6e76.html>.

11. In Texas, there is a singular intermediate appeals court—the Texas Court of Appeals—but the highest courts are bifurcated. The Texas Supreme Court hears civil cases and criminal cases are heard in the Court of Criminal Appeals (“CCA”). In Texas, all criminal cases are appealed to the CCA. More information on the Texas court structure can be found at Texas Courts Online (TCO), <http://www.courts.state.tx.us/> (last visited Nov. 29, 2009).

12. I chose this particular state and court because of their importance in understanding both the death penalty and racial discrimination in jury selection. Between 1880 and 1980, the U.S. Supreme Court heard forty-one cases involving the under-representation of Blacks on juries and two on the under-representation of Hispanics. HIROSHI FUKURAI ET AL., *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* 83 (1993). Texas was the jurisdiction of origin for more Black juror participation cases than any state except for Georgia during this time period. *Id.* (noting that both Texas and Georgia both had eight cases of this type). Additionally, both of the cases involving Hispanics during this time period originated in Texas. *Id.*

quirement of death qualification, to make Black jurors in capital cases extremely rare. Part VII of the Article argues against the continued performance of these rituals and calls for an end to the use of peremptory challenges. The Article concludes by suggesting that the failure to successfully end discrimination through *Batson* hearings may be due to the substantial focus on the fairness of the process for defendants, rather than the role these failures play in constraining the rights of African American citizens to participate in the deliberative process of criminal adjudication.

I. THE LIFE AND DEATH CONSEQUENCES OF RACE AND CAPITAL JURIES

The jury has long been a critical space for citizens to communicate their opinions of the propriety of the behavior of their fellow citizens. However, a number of groups, including African Americans, have not always enjoyed the right to jury participation.¹³ Through litigation, safeguards have evolved to protect the rights of defendants to have juries that reflect the community at large and the rights of all citizens to participate in juries.¹⁴ It is the rights of both these constituencies—the defendant and the citizen in the jury pool—that courts attempt to reconcile when analyzing the jury selection process in *Batson* hearings. However, these machinations have not reduced continuing disparities between Whites and African Americans, as well as other racial minorities, who participate in trials as jurors, or even make it to the panel of potential jurors.¹⁵

Popular notions of the jury as a site where citizens decide whether behavior is fair or correct overlook the way jury decisions also implicitly and explicitly incorporate the prejudices of the citizenry into understandings of fairness.¹⁶ The ethical and legal commitments at work in community evaluations of guilt, as well the limitations of human processes, make the jury an important site for litigation and study. The cases in this section can be read as an attempt to balance those ethical commitments

13. *Id.*

14. *See id.* at 13–17.

15. *See, e.g.,* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (discussing race and the evaluation of innocence in criminal trials); Nancy J. King, *Racial Gerrymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993) (discussing the persistence of a lack of diversity in the racial composition of juries).

16. A study by Hale and McCormick shows that “seventy to seventy-five percent of jurors have a ‘definite’ opinion about who is right in the case by the end of voir dire.” V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* § 8.01 (3d ed. 2001). They also found that eighty percent of jurors make up their minds about a case by the end of opening statements. *Id.* This finding illustrates the significance of the jury selection process, as well as the early interactions between litigants and jury, on the outcome of a trial.

with the reality of racial discrimination in the selection process. After factoring in the additional need to protect the interests of criminal defendants, this balancing act at times is unable to satisfy all the conditions necessary for a fair jury system.

Many of the early cases dealing with the prohibition of racial minorities from jury participation were decided on the grounds that the right to serve on juries is a fundamental attribute of citizenship.¹⁷ However, the importance of African American participation in capital juries goes beyond basic questions of citizenship. Research from the CJP shows that “black jurors [are] far more likely than their white counterparts to have lingering doubts about the defendant’s guilt” and are “less willing to believe that the capital sentencing process is error free.”¹⁸ Black jurors are also more likely to view defendants as “remorseful.”¹⁹ Professor Bowers and his coauthors suggest this finding can be attributed to Black jurors being more acutely attuned to the way Black defendants signal remorse, which then leads to feelings that a defendant warrants mercy.²⁰

The polarization of the views of Black and White jurors is even more pronounced when gender is included in the analysis. As in other areas of the law where remorse is a factor, studies show that views on the death penalty also vary with gender.²¹ Jurors with five or more White males are more than twice as likely to impose death as juries with four or less.²² With Black men, however, there is no threshold effect, which means that there is no number that must be attained before the impact of a Black male juror on sentencing manifests.²³ One is enough. According to the research of the CJP, the mere presence of a Black man on a capital

17. See generally AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 207–245 (2005) (providing background information on the relationship between the United States Constitution and jury trials).

18. William J. Bowers et. al, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1502 (2003). The CJP also found that in cases with a Black defendant and a White victim, Black jurors and White jurors become polarized more than in cases of intra-racial murder with Blacks in favor of life and Whites in favor of death. *Id.* at 1501. This issue of the potentially polarizing effects of juries with multi-racial members should be noted in light of the issues and suggestions raised in this analysis. *Id.*

19. *Id.* at 1502.

20. *Id.* at 1502–1503. Mercy, in this instance, would be life in prison rather than a death sentence.

21. See, e.g., Jonathan M. Golding et al., *The Effect of Gender in the Perception of Elder Physical Abuse in Court*, 29 LAW & HUM. BEHAV. 605, 605–14 (2005) (finding gender differences in views on remorse and abuse in psychological studies of other criminal cases).

22. Bowers et al., *supra* note 5, at 193.

23. Bowers et al., *supra* note 18, at 1513.

jury—even if he supports the death penalty—substantially increases the likelihood of a life sentence in cases with Black defendants.²⁴

The impact of Blacks on capital juries also points to the importance of the notion of linked fate, the predominant theory of African American attitude formation on public policy issues.²⁵ It is not simply, as Bowers and his various coauthors suggest, that Blacks may be more cued into demonstrations of remorse by other Blacks. Linked fate theory argues that Blacks are also cued into a common experience with the state and particularly with discrimination.²⁶ This theory has been persistent and strong in its demonstration of the way in which African Americans overwhelmingly believe their individual fate is tied to the collective destiny of other African Americans.²⁷ When Black jurors read the remorsefulness of Black defendants, they, according to the theory of linked fate, also read a collective experience with the criminal justice system and the common values that determine one's views on the death penalty. In a particular case, the fate of the defendant is the primary issue, but, if we take seriously the argument that criminal punishment is a signifier of social status, racial discrimination in other aspects of the process also works to communicate the location of African Americans in the larger society.

Consider empirical evidence of the racially divergent views on the issue of future dangerousness, an issue that juries address in the sentencing phase of capital trials. According to the Texas procedural rules, the jury must state that it believes “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing

24. *Id.* at 1501. Bowers refers to the particular effects of these gender and racial groups on capital juries as “white male dominance” and “black male presence.” Bowers et al., *supra* note 5, at 192.

25. Linked fate is also the predominant theory of African American political behavior. It is a well-tested measure of both of these aspects of Black politics. For a discussion of the impact of linked fate on African American political participation and attitudes, see, for example, MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN AMERICAN POLITICS* (1994); PATRICIA GURIN ET AL., *HOPE AND INDEPENDENCE: BLACKS' RESPONSE TO ELECTORAL AND PARTY POLITICS* (1989); KATHERINE TATE, *FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS* (1993); HANES WALTON, JR., *AFRICAN AMERICAN POWER AND POLITICS: THE POLITICAL CONTEXT VARIABLE* (1997); Mary Herring et al., *Pro-black Doesn't Mean Anti-white: The Structure of African American Group Identity*, 61 J. POL. 363, 363–86 (1999).

26. DAWSON, *supra* note 25, at 10 (referring to this idea as the “black utility heuristic”). For other articulations the theory of linked fate, see GERALD JAYNES & ROBIN M. WILLIAMS, *A COMMON DESTINY: BLACK AND AMERICAN SOCIETY* (1989); TATE, *supra* note 25.

27. In 1996, nearly 86% of Black respondents in the NBES believed they shared a fate with other Blacks. KATHERINE TATE, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, NATIONAL BLACK ELECTION STUDY (1996), <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/02029.xml>. It is a highly predictive measure of Black political behavior and attitudes.

threat to society” to impose the death penalty.²⁸ Or, stated alternatively, it must answer the question, “Do you think the defendant poses a future danger?” The CJP found that Whites are more likely than Blacks to view Black defendants as dangerous.²⁹ Racial differences in views on dangerousness make the question of Black participation in juries extremely important, especially for a community that has long battled public perceptions that its members are both a physical and social danger.³⁰

The findings of the CJP suggest the need to look at other aspects of the jury selection process. The potential impact of the presence of Blacks—and in some instances their views—in the jury room indicate that prosecutors may be motivated to remove them. *Batson* hearings in capital cases merge the state’s attempt to mitigate discrimination in jury selection with the Court’s call for a fair cross-section of views on juries.³¹ Focusing on this aspect of jury selection permits analysis of the dialogue between African Americans and the state about the death penalty and, in accordance with linked fate theory, African Americans’ view of their status in the larger society.

II. THE LITIGATION OF RACIAL DISCRIMINATION IN JURY SELECTION FROM *STRAUDER* TO *BATSON*

A. *Strauder and Its Progeny*

The ultimate goal of the jury is to allow a defendant’s fellow members of society—or at least those who are not in some way disqualified—to determine whether he or she is guilty or innocent. This goal is commonly

28. Tex. Code Crim. Proc. Ann. art. 37.071, § 2(a)(2)–(b)(1) (Vernon 2009).

29. Bowers et. al, *supra* note 18, at 1503.

30. The historian Earl Lewis documented attempts by Black advocacy groups such as the NAACP to transform public narratives of Blacks as a public danger to “injured citizens.” See generally EARL LEWIS, *CONSTRUCTING AFRICAN AMERICANS AS MINORITIES, IN THE CONSTRUCTION OF MINORITIES* 15 (André Burguière & Raymond Crew eds., 2001). This strategy was part of a collective effort to use public opinion to push for the expansion of political rights in the post-Reconstruction periods. See *id.* For a discussion of how this strategy links with the modern efforts to reframe the death penalty, see generally Melynda Price, *Litigating Salvation: Race, Religion and Innocence in the Cases of Karla Faye Tucker and Gary Graham*, 15 S. CAL. REV. L. & WOMEN’ STUD. 267 (2006).

31. Scholars have explored the relationship between representing a fair cross-section of views on the jury with the participation of racial minorities as jurors. See, e.g., Fukurai, *supra* note 12, at 92 (“A comparison of various Supreme Court opinions illustrates that *cross section* does not mean a cross section of the community, but only a cross section of whatever segment of the community is legally designated for jury duty.”). Fukurai and his co-authors point to a gap in the legal designation of who is fit for jury service and the segments of the community that litigants believe should serve—a gap maintained by the use of peremptory challenges. See *id.* See also generally, Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 BUFF. PUB. INT. L.J. 1 (2005/2006).

referred to as a defendant's right to be judged by his or her peers. A defendant's peers are not limited to those who draw directly from his or her sphere of knowledge, social class, and gender or, of particular relevance to this analysis, race.³² The democratic norms from which the jury system originates are evident in the way the jury allows all citizens to uphold the moral and governmental authority of the criminal justice system through the possibility of jury service. Because of these democratic origins, as groups become incorporated in the "bounded community of citizenship,"³³ systematic bars on their participation in jury service abridge their rights—and to some degree, their obligations—of citizenship. The mention of juries on more than one occasion in the Constitution highlights the importance of the jury in the minds of the Framers, but does not settle the question of who is fit for jury service—a question that has been negotiated in courts and legislatures.³⁴ This part of the Article looks at the evolution of legal protections of African Americans' right to participate in juries and issues that prevent the entrance of African Americans into the jury panel at all.

The passage of the Civil War Amendments legally granted all African Americans the rights of citizenship.³⁵ With the rights of citizenship also

32. For a discussion of the history of the meaning of "peers" in jury service and how that concept has evolved, see Deborah H. Ramirez, *The Mixed Jury and the Ancient Custom of De Medietate Linguae*, 74 B.U. L. REV. 777, 783–96 (1994).

33. The term, "bounded community," originated from work on the death penalty in Texas. JAMES MARQUART, SHELDON EKLAND-OLSON & JONATHAN R. SORENSEN, *THE ROPE, THE CHAIR AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990* 17 (1994). The term is used to refer to that category of citizens who are free from both legal and extralegal violence by the state and private citizens. *Id.*

34. The Constitution mandates that all trials be by jury, except in cases of impeachment. U.S. CONST., art. III, § 2. Both the Fifth and Sixth Amendments articulate jury rights in criminal cases. *Id.* amends. V and VI. The Seventh Amendment provides the right to a jury trial in certain civil cases. *Id.* amend. VII.

35. It is always important to mention that some of the rights of citizenship, particularly voting and jury service, were not fully extended to African American women—or any women—at this time. The tendency to utilize the political and legal status of Black men as a proxy for all members of the Black community has been criticized by Black feminists for its failure to note the differential treatment of Black women in political and scholarly work. See, e.g., BUT SOME OF US ARE BRAVE: ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN: BLACK WOMEN'S STUDIES (Gloria T. Hull et al. eds., 1982). For all women, the right to participate on juries would not be achieved until the 1970's. For example, a Louisiana statute excluded women from the jury pool unless they filed a declaration expressing interest to serve. *Taylor v. Louisiana*, 419 U.S. 522, 523–24 (1975). In *Taylor*, the Court found that there were no women on the venire, despite the fact that they constituted 53 percent of the population in the judicial district. *Id.* In 1979, the Supreme Court overturned a Missouri law that permitted women to be exempted from jury duty upon request and resulted in only 14.5% of the post-summons venire to be comprised of women. *Duren v. Missouri*, 439 U.S. 357, 359–360, 362 (1979). The Supreme Court did not recognize female jurors of all races as having a right against sex discrimination in the use of peremptory challenges until 1994. *J.E.B. v. Ala. ex rel. T.B.* 511 U.S. 127, 143 (1994).

came access to spaces where laws and values were adjudicated, one of the most important being the jury. Jim Crow laws, a system implemented by Whites to maintain the socio-political structure of the Black subjugation that began in the slavery period, excluded Blacks from jury service.³⁶ States constructed these laws in various ways, and many were litigated to the Supreme Court with decisions that sometimes protected and sometimes ignored the rights of African Americans created by the Thirteenth, Fourteenth and Fifteenth Amendments.³⁷

The first critical case involving Black jurors, *Strauder v. West Virginia*, was one of the successes in terms of the Court's willingness to protect this aspect of the African American citizenship rights.³⁸ Strauder, a Black man, was convicted of murder, and his conviction was upheld by the West Virginia Supreme Court.³⁹ Strauder petitioned the U.S. Supreme Court to overturn his conviction because West Virginia law permitted only White men to serve on juries.⁴⁰ This statute, the defense argued, denied Strauder of his right to equal protection of the laws.⁴¹ The Court agreed with Strauder and added that the right to serve on juries was critical to elevating the citizenship of Blacks to the level of Whites.⁴² The Court specifically addressed the connection between racially discriminatory jury selection rules and the meaning of citizenship, noting:

It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.⁴³

It should be noted that *Strauder* does not guarantee a right to have members of the defendant's race seated as jurors; it only guarantees that members of the defendant's race will not be statutorily excluded from the pool of potential jurors.⁴⁴

36. For a lengthy discussion on the evolution of the construction of the southern racial hierarchy of Jim Crow, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1957), the classic text on the subject; see also GLENDA E. GILMORE, *DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS: 1919-1950* (2008).

37. See, e.g., FUKURAI, *supra* note 12, at 13-17.

38. *Strauder v. West Virginia*, 100 U.S. 303, 306-307 (1880).

39. *Id.* at 304.

40. *Id.*

41. *Id.* at 305.

42. *Id.* at 308.

43. *Id.* at 309.

44. *Id.* at 305 ("It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried,

In 1935, the Supreme Court again addressed the exclusion of qualified Black citizens from jury service. Clarence Norris was one of nine Black “boys” convicted of rape in Jackson County, Alabama, in 1931.⁴⁵ The Supreme Court reversed Norris’s conviction, along with those of six of the other defendants, because of due process violations in the trial and remanded the case to the state court for a new trial.⁴⁶ At the onset of the second trial, Norris’s counsel motioned to quash the indictment and the trial venire because Blacks were excluded from jury service.⁴⁷ The trial judge denied both motions and the jury sentenced Norris to death.⁴⁸ Norris again appealed his sentence to the Supreme Court,⁴⁹ which held that the state violated Norris’s rights by excluding all Blacks from serving on his jury.⁵⁰ The record revealed rampant racial discrimination in jury administration in the county where Norris’s second trial occurred.⁵¹ The Court reiterated a conclusion it drew in *Neal v. Delaware* over five decades earlier:

[I]t was . . . a ‘violent presumption’ which the State court indulged, that such uniform exclusion of [the black] race from juries, during a period of many years, was solely because, in the judgment of the officers . . . ‘the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.’⁵²

Despite articulating these rights, *Strauder* and *Norris* did not alter the practice, well into the twentieth century, of systematic exclusion of African Americans from juries.⁵³ *Strauder*, however, represents the beginning of the continued legal wrangling that connects jury service and other forms of civic participation to attempts by African Americans to secure their rights as citizens.⁵⁴ The battle for unbiased selection and administration of

all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.”).

45. *Norris v. Alabama*, 294 U.S. 587, 588 (1935).

46. *Id.* at 588.

47. *Id.*

48. *Id.*

49. *Id.* at 589.

50. *Id.* at 596–598.

51. *Id.* at 591–92.

52. *Id.* at 599 (quoting *Neal v. Delaware*, 103 U.S. 370, 397 (1880)).

53. See generally FUKURAI, *supra* note 12, at 86–89.

54. In his biography of the Constitution, Akhil Amar couples jury service with the right to vote and hold and serve in office as the “kindred political rights” omitted from the Thirteenth Amendment and then necessitating the passage of the Fourteenth Amendment the following year. AMAR, *supra* note 17, at 351. Amar emphasizes the need to avoid the modern tendency to view these political rights as indivisibly tied to each other both in their political development and legal interpretation. *Id.* In Amar’s view, each “arose in its

juries has been altered in recent decades by the creation of new mechanisms of policing discriminatory exclusion of racial minorities from jury service.

B. *The Contours of Batson*

In *Batson v. Kentucky*, the Supreme Court addressed the harm to defendants when jurors are seated using discriminatory methods.⁵⁵ Though the Supreme Court clearly expressed its desire to prevent states from denying African Americans the right to serve on juries through legislative restrictions in *Strauder*, *Batson* tackled the more complicated issue of the role race plays in the use of peremptory challenges. In *Batson*, the Supreme Court settled conflict over the correct application of the rule articulated in *Swain v. Alabama*, with adjustments to the standards for demonstrating racial discrimination in peremptory challenges.⁵⁶

In *Swain*, the Court held that a “State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.”⁵⁷ The Court further held that peremptory challenges were a necessary part of the administration of justice.⁵⁸ To demonstrate a prima facie case of racially discriminatory peremptory challenges under *Swain*, a Black defendant needed to show not only that he was a member of a cognizable racial group that could be singled out for differential treatment, but also evidence of “the prosecutor’s systematic use of peremptory challenges against Negroes over a period of time.”⁵⁹ *Swain* also required defendants to prove systematic discrimination in the use of peremptory challenges across multiple trials, which meant that the remedy for discrimination in a defendant’s immediate case was only available on appeal or after exhaustive research on the practices in that jurisdiction.⁶⁰

Due to the high evidentiary standard required to prove constitutional harm, *Swain* had little practical impact.⁶¹ In his concurring opinion in *Swain*, Justice Marshall pointed to several examples where defendants attempted to mount such claims. In one instance, the defendant presented evidence that in a single year prosecutors in Dallas County, Texas, struck

own unique historical moment; each raised its own set of issues, and in each amendment battle neither side could know whether additional battles would follow.” *Id.* at 351.

55. *Batson*, 476 U.S. at 87–88.

56. *Id.* at 84–86.

57. *Swain v. Alabama*, 380 U.S. 202, 203–04 (1965).

58. *Id.* at 219.

59. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *Swain*, 380 U.S. at 227.

60. *Swain*, 380 U.S. at 222.

61. In its decision in *Batson*, the Court cites to the “practical difficulties” faced by lower courts in the application of *Swain*. *Batson*, 476 U.S. at 92 n.17.

405 out of 467 Black jurors with peremptory challenges.⁶² Even this showing was not sufficient proof of racially motivated peremptory challenges under *Swain*.⁶³ The majority of defendants cannot afford the investigation required to compile the statistics that demonstrate systematic discrimination. Nevertheless, even if the defendant can gather the evidence, the Dallas County example suggests it may not be sufficient unless perhaps *all* Blacks were removed using peremptory challenges.

Nevertheless, because the jury's "central position in our system of justice" is to "safeguard a person accused of crime against the arbitrary exercise of power by prosecutor or judge," Justice Powell's majority opinion argued that racial discrimination in the jury process goes beyond a violation of the Equal Protection rights of the qualified individual denied jury service to affect the "entire community" by "undermin[ing] public confidence in the fairness of our system of justice."⁶⁴

Whereas *Strauder* and its progeny repeatedly stated that selecting only Whites to be on the panel of citizens summoned for jury duty—also called the venire or jury pool—violates the Equal Protection Clause, *Batson* involved the racially discriminatory use of peremptory challenges. In selecting which jurors to seat from the venire, each side of the dispute is allowed to remove a limited number of jurors without showing cause using challenges based on their subjective discretion.⁶⁵ This type of removal is called a peremptory challenge. Peremptory challenges acknowledge that lawyers over time develop certain intuitive strategies—hunches, instincts—for evaluating whether a juror will be biased or in some way detrimental to their case.⁶⁶ In *Batson*, the Court demarcated the line between the prosecutors' historically unfettered right to use their instincts in the form of peremptory challenges and the purposeful use of race discrimination in

62. *Batson*, 476 U.S. at 104. The Dallas County Prosecutor used a handbook for jury selection that encouraged prosecutors to eliminate "any member of a minority group." Steve McGonigle and Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors routinely bar blacks*, DALLAS MORNING NEWS, Mar. 9, 1986, at 1A, available at <http://www.dallasnews.com/sharedcontent/dws/news/longterm/stories/030986.829cdf8f.html>. An earlier jury-selection treatise circulated in the same county instructed prosecutors: "Do not take Jews, Negroes, Dagons, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." *Tompkins v. State*, 774 S.W.2d 195, 203 (Tex. Crim. App. 1987).

63. *Batson*, 476 U.S. at 104; *Swain*, 380 U.S. at 228.

64. *Batson*, 476 U.S. at 86–87.

65. Both the prosecution and the defense are allowed an unlimited number of challenges "for cause." 47 AM. JUR. 2d *Jury* § 200. Parties support challenges for cause with a specific reason that can automatically remove a juror. *Id.* Whether a reason is sufficient to automatically remove a juror frequently depends on whether the court determines there is suitable reason for the person to be biased. 47 AM. JUR. 2d *Jury* § 202.

66. I say prosecutors here because *Batson* is silent as to the racially discriminatory use of peremptory challenges by the defense. See *Batson*, 476 U.S. at 89 n.12. Also, this analysis focuses on the interaction between Black citizens and the state as represented by the prosecutor.

peremptory challenges.⁶⁷ The Court connected the constitutional bar on legislation excluding minorities from the venire to racially discriminatory peremptory challenges because of the importance of peremptory challenges in selecting the trial jury.⁶⁸ The significance of peremptory challenges in jury selection makes them necessarily subject to constitutional review.⁶⁹

The majority opinion in *Batson* directs much of its focus to the latter part of the Court's decision in *Swain*.⁷⁰ The amount of time and effort *Swain* required of defendants to object to a discriminatory peremptory challenge made it an often insurmountable obstacle to making a successful objection. *Batson* created a new process for evaluating the use of peremptory challenges against racial minorities the instant they occurred.⁷¹

Batson lessened the level of proof necessary to make a showing of discrimination and particularized the inquiry such that defendants only need to show racial discrimination by the prosecutor in the case instantly before the court. Defendants no longer need to prove discrimination across multiple cases and over time. According to the new rule articulated in *Batson*, to make a showing of racial bias in the prosecutor's use of peremptory challenges, defendants must demonstrate three things: 1) That they are a "member of a cognizable racial group"⁷² and "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race;" 2) That "peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate;"⁷³ and 3) That these facts and other "relevant circumstances raise an inference" that the prosecutor used peremptory

67. *Id.* at 91 ("The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race.") (citation omitted).

68. *Id.* at 99 ("By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.").

69. *Id.* at 89 ("Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.").

70. The *Batson* majority mentions *Swain* more than forty times. *Batson*, 476 U.S. at 89.

71. *Id.* at 129 ("Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion.").

72. This part of the rule was first articulated in *Castaneda*. *Castaneda*, 430 U.S. at 494-95.

73. This part of the rule is now considered an indisputable factor in the legal analysis of the use of peremptory challenges to remove of racial minorities.

challenges to remove members of the defendant's race from the trial jury.⁷⁴

The result of these requirements is what is in practice referred to as the *Batson* hearing. In *Batson* hearings, the defendant's lawyer can object if he or she believes the prosecutor is using peremptory challenges to strike jurors based on race. As soon as a lawyer objects, the proceedings halt. The trial judge then questions the prosecutor as to his or her reasons for striking the Black jurors in question with peremptory challenges. The prosecutor must then articulate race neutral reasons for the removals.⁷⁵ Though on opposite sides of the *Batson* holding, Justices Marshall and Rehnquist both predicted what would later become the clear problem with *Batson*: proving intentional racial discrimination is very difficult.⁷⁶

In his concurring opinion, Justice Marshall went further than any other member of the Court at that time by stating that the elimination of peremptory challenges is the only solution to discriminatory uses of peremptory challenges.⁷⁷ Marshall echoed the Court's holding that the use of peremptory challenges to remove Blacks from juries violates the Equal Protection Clause. Justice Rehnquist, in his dissent, defended peremptory challenges as a historic and valued tool for legal practitioners. In his view, as long as peremptory challenges are used to remove jurors of all races in cases where the defendant's and the juror's race are the same, then there is no equal protection problem because Blacks are not singled out.⁷⁸ The prosecutor's decision to peremptorily challenge a venireperson is at "best based upon seat-of-the-pants instincts," which Rehnquist acknowledges may be "crudely stereotypical and may in many cases be hopelessly mistaken," but are acceptable if the mistake is made across racial lines.⁷⁹ Marshall directly addressed this point, arguing that "'seat-of-the-pants' instincts may often be just another term for racial prejudice."⁸⁰ Marshall suggested that "even if all parties approach the Court's mandate with the best of conscious intentions," individuals possess subconscious racism on which these "instincts" might be based. It requires a high a level of awareness for courts and prosecutors to perceive and overcome the effect of

74. *Batson*, 476 U.S. at 96.

75. *Id.* at 98 ("The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.").

76. See *Batson*, 476 U.S. at 105 (Marshall, J., concurring) ("[D]efendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case."); *Id.* at 127-28 (Rehnquist, J., dissenting) ("Anything short of a challenge for cause may well be seen as an 'arbitrary and capricious' challenge . . .").

77. *Id.* at 103.

78. *Id.* at 112.

79. *Id.* at 138 (Rehnquist, J., dissenting).

80. *Id.* at 106 (Marshall, J., concurring).

their unconscious bias.⁸¹ Marshall doubted the ability of individuals to meet these standards and arguments in this Article suggest additional reasons for continued skepticism. In Marshall's view, the potential for racial bias in peremptory challenges is so high that they should be discontinued.⁸²

Though Marshall and Rehnquist argued for completely opposite resolutions in *Batson*, their positions forecasted the resulting complications of the decision. Prosecutors do indeed rely on instincts and past experi-

81. To maintain race neutrality in making peremptory challenges, litigators must not only be highly self-aware of possible racial bias, as Justice Marshall suggests, but also able to racially categorize venire members using only visual assessments. Race is not a question on the juror form in most, which means litigators and courts must determine a juror's race on their own. Much scholarly attention has been given to the notion that race is a social construction. This view of race can be extremely powerful when assessing the structural policies and views that shape the meaning of race, but this idea often becomes problematic when very real and pragmatic applications turn on whether or not a person falls within a constructed racial category. The rule of hypo-descent or the "one drop rule" and the sexual politics of both ante and post-bellum America often required mixed race offspring to be designated as the race of the racially "subordinate" parent. See generally F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (2001), WHO IS BLACK?: ONE NATION'S DEFINITION (2001). The wide array of phenotypes among African Americans can make visual determinations tricky for the keenest eye. Upon hearing the subject of this Article, a Lexington, Kentucky district court judge, Lewis Paisley, relayed the following story: In a case with a Black defendant, a Black defense attorney, and a White prosecutor, the defense attorney raised a *Batson* objection. The judge had the attorneys step forward. At the bench, there was some confusion as to why a *Batson* objection was raised for that particular juror. After some back and forth between the defense attorney and the prosecutor on the race of the juror prompting the objection, they reached a stalemate, with the Black attorney exclaiming that he knew a Black man when he saw one. The White attorney exclaimed that he too could identify members of his own racial group when he saw them. The juror at issue did not participate at all in this conflict. The district court judge—who is White and was also unsure of the juror's racial identity—could not recall the resolution of the objection. Even without the ending, this story provides anecdotal evidence of the difficulty of the initial step of racial identification required by *Batson*. This issue was also raised in the CCA In *Gibson v. Texas*. In response to a *Batson* challenge, the state claimed that the defendant failed to make a prima facie case by not proving that the jurors, whose differential treatment formed the basis of the objection, were of different races. *Gibson v. Texas*, 144 S.W.3d 530, 533 n.4 (Tex. Crim. App. 2004). Both these examples highlight the information deficits that exist in these situations. These problems are amplified when a racial identification is based on the subjective determination of every participant, including clerks, except the juror. An appellate court only has the record before them. The confusion around identification shows the complexity of just the first step in the evaluation of *Batson* claims. To then ask litigants to be aware of and then reveal racial biases that might inhibit the fair selection of a jury seems to ask for more than is possible. *Batson*, 476 U.S. at 106 ("Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.").

82. *Batson*, 476 U.S. at 108 (Marshall, J., concurring) ("However, only by banning peremptories entirely can such discrimination be ended.").

ence to make decisions about which jurors would be best for the state.⁸³ Peremptory challenges allow both sides to remove jurors based on those qualities that do not amount to cause for removal, but arouse certain unease in the litigant about a juror's presence on this particular jury. However, in assessing the suitability of a juror for service, lawyers sometimes base decisions on generalization about racial minorities and their perspectives. If racial bias could be overcome by asking the lawyers if their challenges were racially motivated, then the shallowness of the current investigations into the reasons offered by prosecutors would be satisfactory and Justice Marshall's concerns about intentional deception and masked racism an unnecessary cautionary tale.⁸⁴ Later decisions on *Batson* related claims seem to suggest ad hominem that trial courts will be able to see through "implausible or fantastic justifications."⁸⁵ However, African Americans continue to be underrepresented in jury pools, with explanations for this phenomena ranging from low levels of desire to participate among African Americans, to structural obstacles, such as the exclusive use of voter registration roles instead of driver's license records to select venirepersons.⁸⁶ In recent years, felon disenfranchisement—the loss of citizenship rights due to criminal convictions—has become another important structural obstacle for African Americans in the jury process.⁸⁷ The structural obstacles now limiting African American participation may overwhelm the Supreme Court's attempts to curb discrimination in other parts of the jury selection process.

83. It should be noted again that both prosecutors and defense attorneys use peremptory challenges in race-conscious ways. Samuel Gross argues that "[i]t has been common knowledge for decades that prosecutors and defense attorneys use race as a basis for deciding which potential jurors to challenge and which to accept." Samuel R. Gross, *Race, Peremptories and Capital Jury Deliberation*, 3 U. PA. J. CONST. L. 283, 288 (2001). This common use by prosecutors and defense attorney does not negate the individual responsibility to utilize constitutional practices.

84. *Batson*, 476 U.S. at 106 ("If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.").

85. See, e.g., *Purket v. Elem*, 514 U.S. 765, 767–68 (1995) ("The second step of this process does not demand an explanation that is persuasive, or even plausible.").

86. Several efforts have been made to increase the representativeness of jury pools. These efforts include using voter registration rolls and drivers license records to access the names of potential jurors. For a more detailed discussion, see FUKARAI, *supra* note 12, at 40–68.

87. See, e.g., KHALILAH BROWN-DEAN, *Permanent Outsiders: Felon Disenfranchisement and the Breakdown of Black Politics*, in *THE EXPANDING BOUNDARIES OF BLACK POLITICS* 103 (Georgia A. Persons ed., 2007).

III. *BATSON* HEARINGS AS RITUAL IN CAPITAL CASES:
THEORY AND PRACTICE

Across time and disciplines, the definition of ritual has varied. This Article draws on the writing of the sociologist Robert Wuthnow, who in his extensive career has demonstrated the linkages between culture, religion, morality and meaning in American social structures, including the law.⁸⁸ In *Meaning and Moral Order: Explorations in Cultural Analysis*, Wuthnow defines ritual as “a symbolic-expressive aspect of behavior that communicates something about social relations, often in relatively dramatic or formal manner.”⁸⁹

Actions, for Wuthnow, are symbolic “if they stand for something else” or “if they communicate meanings rather than being performed for purely practical or instrumental purposes.”⁹⁰ The activities that make up ritual have meanings that go beyond superficial performances.⁹¹ Regarding the motives and intentions of actors in a ritual, Wuthnow states, “ritual provides an occasion for making public what one thinks, feels, or intends to do.”⁹² The most fundamental role of ritual is to regulate and define social relations.⁹³ Ritual does this by making boundaries between social groups clear, by reminding participants of their relationships, or by sending signals concerning social positions.⁹⁴ Wuthnow compares ritual to a “thermostat,” giving “feedback about how to regulate behavior so as to better attain the collective goals of that behavior.”⁹⁵

Previous scholarship, by others and me, theorizes that the death penalty is a way of regulating behavior and defining community membership.⁹⁶ Wuthnow’s concept of ritual shows that *Batson* hearings function similarly. Through the fixed performance in the trial process, courts aim to prevent racially motivated removal of jurors. The defendant objects to the prosecutor’s removal of African American jurors using peremptory challenges. The proceedings pause. The prosecutor offers race neutral reasons for the removals. The judge affirms or denies those reasons.

88. For a bibliography of Robert Wuthnow’s substantial writing in this area, see Robert Wuthnow, <http://www.princeton.edu/~wuthnow/publications.html> (last visited Oct. 11, 2009).

89. ROBERT WUTHNOW, *MEANING AND MORAL ORDER: EXPLORATIONS IN CULTURAL ANALYSIS* 109 (1987) (emphasis omitted).

90. *Id.* at 99.

91. *Id.*

92. *Id.* at 104. Note that the “one” to which Wuthnow refers is not necessarily the individual but also includes institutional actors like the state.

93. *Id.* at 107.

94. *Id.*

95. *Id.*

96. See generally TIMOTHY V. KAUFMAN-OSBORN, *FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE* (2002); MARQUART ET AL., *supra*, note 34; Price, *supra* note 30.

The trial continues. With *Batson* hearings, courts now have a process that serves as an active affirmation of the non-discriminatory selection of juries. The law requires judges and legal counsel to act out, in dramatic fashion, this process, as a way of communicating that race is not a factor in peremptory challenges. In this very same action, courts can ignore the unconstitutional use of race in peremptory challenges.

Wuthnow argues that each participant in a ritual plays his or her role to those that have some allegiance—political, philosophical, or moral—with him or her. The state, represented simultaneously by the prosecutor and the court, communicates a certain set of values to those who are allied with the state and its policies, which, in this instance, include the death penalty. The defendant communicates a certain position to those in his or her community. I do not argue that these alliances break evenly along racial lines, but the disproportionate role of African Americans as defendants and dismissed members of the venire suggests that the state views African Americans as being allied with those who oppose the state and its policies on the death penalty.⁹⁷

How does the viewer of the *Batson* ritual know that it has fulfilled its role of preventing racially motivated peremptory challenges? The viewer—whether it be society, the defense attorney, the dismissed juror, or a court clerk—knows because the prosecutor publicly declares in the authoritative space of the courtroom the absence of motives animated by race in the removals in question. Our understanding of the physical space in which these hearings take place should not be limited to the courtrooms or the courthouses in which these courtrooms are located, nor the audience to litigants and jurors. These courtrooms and courthouses, as well as the people, are located in a legal, political and cultural context that

97. I interviewed a Black prosecutor in Harris County who argued that the death penalty is not skewed toward particular racial groups and the sentence is only dispensed when the crime warrants it. The prosecutor explains with the following:

Well, they say if you're a black, okay, you're on automatic rail to death row. That's not so! . . . nobody got an advantage going here. It's simply because you are—I'm saying we get just as many White occasions of death sentence that I've seen them give other.

Interview with Black Harris County Prosecutor (Houston, Tex., August 15, 2004). He holds this belief despite public opinion polls in Houston finding that 78.9% of African Americans in his jurisdiction believed that the death penalty is not applied fairly across racial lines. Turner Allan, *A deadly distinction: Bloodthirsty image at odds with local polls*, HOUS. CHRON., Feb. 04, 2001, at A1. By comparison, only 38.9% of Whites believed the death penalty was racially biased. *Id.* These disparate views among African Americans and between African Americans and Whites show that race is an important but not a determinative factor in how a person views the death penalty. A new study by a sociologist at the University of Denver also found a direct link between race and the death sentence, holding all other factors—e.g., race of the victim, crime—constant. Scott Phillips, *Race in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807 (2008).

is steeped in the practices, traditions, and values of the people and landscape on which they stand.

The legal, political and cultural backdrop in which the hearings analyzed here occur is one where race and racism have been, at times, determinative and continue to be factors in the way in which the death penalty is administered. Texas is ground zero for capital trials and convictions. The citizens of the state of Texas may not each be privy to the individual proceedings in capital cases, but they are aware that they occur and of the eventual executions, and they are clearly members of the *Batson* ritual's audience. Despite the history of the state and the well-documented discriminatory practices of its agents, the CCA has only found the prosecution's use of peremptory challenges to violate the constitutional rule articulated in *Batson* in a limited number of cases.⁹⁸ The decisions of this highest Texas criminal court have, however, gone to the Supreme Court and forced it to more clearly define the relationship between peremptory challenges and constitutionally prohibited uses of race.⁹⁹ To some degree, one can witness the development of *Batson* hearings and their ritualization in this space. The courts, the agents, and those persons of color who have been unconstitutionally removed from juries in this state are a critical community for understanding these hearings.

For almost two decades, the Dallas County Prosecutor's Office used a training manual as part of its official practices that instructed prosecutors to remove "any member of a minority group which may subject him to oppression" because "[members of oppressed groups] almost always sympathize with the accused."¹⁰⁰ The *Dallas Morning News* published a study in 1986 that found, as a result of the Dallas County Prosecutor's policies, only 2.8% of the jurors on capital murder cases were Black and prosecu-

98. Between 1987 and 2006 only *one* case was overturned on *Batson* grounds by the CCA. *Chambers*, 742 S. W. 2d 695. Prosecutors' use of manuals that directed prosecutors in Dallas County, Texas to utilize race and other constitutionally prohibited factors is discussed in an earlier footnote. See discussion *supra* note 64. A study by the Texas Defender Service, a non-profit legal defense organization, published the testimony of several former prosecutors from Harris County and counties around the state who witnessed such practices post-*Batson*. See TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 54–59 (2007), <http://www.texasdefender.org/publications.asp> (last visited Sept. 12, 2008).

99. *Batson* and *Miller-El* are only recent examples of the involvement of Texas state courts in the evolution of constitutional law on jury discrimination. As early as 1940, the U.S. Supreme Court overturned unanimously a Texas statute that systematically excluded Blacks from juror lists. *Smith v. Texas*, 311 U.S. 128, 132 (1940). In *Smith*, the court used statistical analysis to show that in Harris County, where the defendant was convicted, the population of African Americans numbered more than twenty percent. *Id.* at 128–29. Despite the estimated three to six thousand Blacks eligible, only five were seated on grand juries between 1931 and 1938. *Id.* at 129. *Smith* began nearly six decades of the Supreme Court's attempt to regulate and rectify racial discrimination in jury selection in Texas.

100. See also *Batson*, 476 U.S. at 104 n.3 (1986) (Marshall, J., concurring) (quoting newspaper article).

tors used peremptory challenges to strike an amazing 92% of Black jurors.¹⁰¹ It is not known how long the office maintained this unofficial policy.¹⁰² Other counties in Texas also used such practices, and stated them explicitly in training manuals.¹⁰³ Harris County, which covers most of Houston, also engaged in such practices¹⁰⁴ and, if only informally, institutionalized the removal of racial and religious minorities with peremptory challenges.¹⁰⁵ Studies demonstrate that prosecutors in other jurisdictions intentionally used peremptory challenges to remove from juries African Americans, as well as Latinos, Jews and the disabled.¹⁰⁶

Recent litigation reaffirms the importance of Texas courts in the evolution of the *Batson* ritual.¹⁰⁷ In *Miller-El*, the Supreme Court returned to the practices of the Dallas County District Attorney's office and the CCA's evaluation of *Batson* error.¹⁰⁸ *Miller-El* stands as the current standard for evaluating the constitutionality of peremptory challenges. The interpretive approach that grows out of *Miller-El* is best captured in the Court's urging of lower courts to look at "broader practices" during the jury selection. *Miller-El* also shows that *Batson* hearings, without significant

101. *Id.*

102. In 2006, the DALLAS MORNING NEWS revisited jury strikes in Dallas County, a jurisdiction that has been a constant presence in peremptory challenges cases. Steve McGonigle, Holly Becka, Jennifer La Fleur and Tim Wyatt, *Jurors race a focal point for defense: Rival lawyers reject whites at a higher rate*, DALLAS MORNING NEWS, Jan. 24, 2006 available at <http://www.dallasnews.com/sharedcontent/dws/news/longterm/stories/082105dnprosecutors.378d9eb.html>.

103. Similar practices were found in other Texas counties as well. See, e.g., *Ex parte Brandley*, 781 S.W.2d. 886, 926 (Tex. Crim. App. 1989).

104. In 2008 the Harris County district attorney resigned after sending e-mails that included racist jokes and jokes about the cases involving Black defendants prosecuted by his office. Ralph Blumenthal, *Prosecutor, Under Fire, Steps Down in Houston*, N.Y. TIMES, Feb. 16, 2008, at A10. This suggests that the tenor of racially biased thinking continues to exist in prosecutors' offices in Texas. This event only reinforces the continued need for procedures more effective than *Batson* hearings.

105. The Texas Defender Service, a non-profit legal defense organization, published study including the testimony of several former prosecutors from Harris County and counties around the state who witnessed such practices post-*Batson*. See, TEXAS DEFENDER SERVICE, *supra* note 98.

106. See, TEXAS DEFENDER SERVICE, *supra* note 99. In addition to the study of peremptory challenges in that jurisdiction undertaken by the *Dallas Morning News*, other studies revealed similar patterns in other locations. In a review of capital cases from the mid to late 1970s in Florida, patterns of racial discrimination in peremptory challenges are evident. Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 39 (1982). This study was followed by studies on other states. See generally Baldus et al., *supra* note 10; Rose, *supra* note 10; Turner, *supra* note 10; Becka et al., *supra* note 10.

107. In 1985, an all-White jury sentenced Thomas Miller-El to death after the prosecutor dismissed ten qualified Black jurors by peremptory challenge. *Miller-El v. Dretke*, 545 U.S. 231 (2005). The trial court found under *Swain*, the guiding case at the time, no evidence of "systematic exclusion of blacks as a matter of policy." *Id.* at 236.

108. *Id.* at 236-37.

investigation and motivation by the lower courts, often fail in their purpose of preventing discrimination, while succeeding in permitting unconstitutional death sentences. *Miller-El* calls for analysis of the cultural context in which the strikes occur. These include, for instance, the racist history and practices of the Dallas County District Attorney, a comparative analysis of differences in treatment between those jurors seated and those removed—for instance, a comparison of Blacks and Whites in the venire—and attention to what is physically taking place in the courtroom—for instance, jury shuffles.¹⁰⁹ I, like Justice Souter—who wrote for the majority—focus this section of the Article on two of the practices the prosecution in *Miller-El* used to select the jury because they clearly demonstrate the state's expressive and dramatic communication of who is not a fit juror in capital cases: The first is known in Texas as the jury shuffle; the second is the provision of different prefatory statements about the death penalty to Black and White members of the venire panel.¹¹⁰

The jury shuffle allows either party to request that the clerk of the court literally shuffle the cards bearing the jurors' names.¹¹¹ In *Miller-El*, a number of the Black jurors were seated at the beginning of the panel, so the prosecutor requested a shuffle, moving the Blacks at the beginning to the end.¹¹² The prosecution and the defense spent the next few weeks shuffling the venire panel in a kind of legal musical chairs, trying to move Blacks to or from the front of the panel.¹¹³ I do not argue that the Black members of this venire are the metaphorical Rosa Parks of jury selection being forced to the rear of a different bus. The front and back of the courtroom or beginning and end of the line are really irrelevant. What is relevant is that, despite the legal commitments and rules in place to prevent racial discrimination, the trial court permits, the prosecutors request,

109. *Id.* at 252–66.

110. *See, e.g., id.* at 253 (“The first clue to the prosecutors’ intentions, distinct from the peremptory challenges themselves, is their resort during voir dire to a procedure known in Texas as the jury shuffle.”); *id.* at 255 (“Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail.”).

111. The procedure is conducted under TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 2004–05).

112. *Miller-El*, 545 U.S. at 254.

113. The record reflects that both the prosecution and defense asked for shuffles. *Id.* The Court found the fact that the defense actually asked for more shuffles than the prosecution irrelevant. *Id.* at 255 n.14. Justice Souter wrote that the uses of the jury shuffle by the defense did not negate a suspicion of racial discrimination on the part of the prosecutor. *Id.*

Discrimination by prosecutors is distinct from discrimination by the defense in these shuffles because of the prosecutor’s role as the state’s agent—a difference the Court also acknowledged. *Id.* at 254. Akhil Amar argues that racially motivated peremptory challenges, “even in the hands of a defendant, violate the Fifteenth Amendment.” Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1178 (1995).

and everyone participates in literally moving the entire panel around the courtroom in an attempt to consistently position Blacks for exclusion. The whole performance pivots around the state's desire to exclude Blacks rather than to select a fair jury. The second practice in *Miller-El* that reveals this dramatic and expressive desire for exclusion is the prosecutors' use of different prefatory statements for Blacks and Whites when describing the juror's role in capital trials. The prosecution made statements to the jurors just prior to questioning their personal views on the death penalty.¹¹⁴ Ninety-four percent of White jurors heard the following:

I feel like it [is] only fair that we tell you our position in this case. The State of Texas . . . is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity and type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative.¹¹⁵

However, fifty-three percent of African American venire members and six percent of the White venire members heard the following more "graphic" statement:

I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El. . . . We do that with the anticipation that . . . at some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case.¹¹⁶

The state argued the prefatory statements provided were not based on race, but on the jurors' ambivalence toward the death penalty in an attempt to expose jurors who were "uncertain" about the death penalty.¹¹⁷ However, differential treatment of Black and White jurors to ensure the exclusion of one group communicates to those in the excluded group that the state views them as less valuable both as jurors and as citizens whose rights are worthy of state protection.

Prosecutors frequently offer ambivalence about the death penalty on the part of African American members of the venire as a race neutral

114. *Miller-El*, 545 U.S. at 255 (citation omitted).

115. *Id.* at 255–56.

116. *Id.* at 256 (citations omitted).

117. *Id.* at 256–57.

reason for use of peremptory strikes, as the capital cases discussed later in this Article demonstrate. However, in *Miller-El* the Court found this reason did not fit the facts of the case, given that Black jurors were more likely to hear the latter “graphic” statement about the death penalty than Whites regardless of their opinion on the death penalty.¹¹⁸ That is, even if the Court based its analysis only on ambivalent jurors, Black ambivalent jurors were still more likely to be presented with the more graphic statements.¹¹⁹ The Court concluded that the behavior of the prosecutors in the *Miller-El* jury selection coupled with the Dallas County Prosecutor’s history of racially discriminatory jury practices was more than sufficient to warrant reversing the state court and granting *Miller-El* relief.¹²⁰

In his concurring opinion, Justice Breyer outlined the way “bar journals,” “trial consulting firms,” and “materials” from legal organization have more broadly systematized “the use of race and gender-based stereotypes in the jury-selection.”¹²¹ These efforts to train litigators in jury selection today may be doing more than any single handbook in one prosecutor’s office could have done to entrench discriminatory practices in the use of peremptory challenges. I echo Justice Breyer’s suggestion in his concurrence that *Miller-El* only further exemplifies the difficulties of proving that a prosecutor’s motives are race neutral when using peremptory challenges.¹²² The Supreme Court reaffirmed the view that one must look beyond the dialogue between attorney and juror to determine

118. It is important to note that the differences between the majority and minority opinions in *Miller-El* turn on the Justices’ different characterizations of the venire members’ responses to the jury questionnaire. The majority opinion in footnote 17 said as much with the following:

The dissent has conducted a similar statistical analysis that it contends supports the State’s argument that the graphic script was used to expose the true feelings of jurors who professed ambivalence about the death penalty on their questionnaires. A few examples suffice to show that the dissent’s conclusions rest on characterizations of panel members’ questionnaire responses that we consider implausible.

Id. at 258 n.17 (citation omitted). The fact that the Court, with the primary responsibility for articulating the rules on the use of peremptory challenges, was divided on how the individual responses of jurors should be interpreted is telling of the vagaries involved in evaluating claims of discrimination in the peremptory challenges.

119. *Id.* at 258.

120. *Id.* at 264–66.

121. *Id.* at 270–72 (Breyer, J., concurring).

122. *Id.* at 267 (“To begin with, this case illustrates the practical problems of proof that Justice Marshall described.”). This point first brought to the Court’s attention by Justice Marshall in *Swain*, 380 U.S. at 220–22.

whether race has been used impermissibly in selecting a capital jury in 2008.¹²³

One attorney summarized the futility of *Batson* claims in Texas courts with the following statement:

The state doesn't have to worry about coming up with *Batson* excuses anymore because it is not politically popular to do anything for a defendant, so the objection is never going to be sustained And, if the appeals courts do anything to uphold the law, they know the CCA [Court of Criminal Appeals] will overturn them.¹²⁴

Between 1987 and 2006 only *one* case was overturned on *Batson* grounds by the CCA.¹²⁵ The disparate use of peremptory challenges against African Americans is not unique to Texas despite its consistent presence in litigation. Studies in Florida, Louisiana, North Carolina, and Pennsylvania point to the disproportionate use of peremptory challenges against Blacks.¹²⁶ The role of these hearings as a safety net against racial discrimination in jury selection has failed, leaving significant disparities in the number of African Americans on capital juries.

Wuthnow provides us with the logical next question: the meanings and definition of social status. This is not the first application of the concept of ritual to the study of the death penalty. Prior analysis focused on the execution itself.¹²⁷ In the study of race and the ritualistic nature of executing, authors suggest that Black bodies—especially Black, male bodies—make a better sacrifice at the altar of state power.¹²⁸ I suggest that the analysis of the ritualistic nature of capital punishment needs to be applied at much earlier stages in the process, so that we can see the diffuse ways in which African Americans' dysfunctional relationship with the state manifests itself. The symbolic and literal meaning of the death penalty for

123. *Snyder v. Louisiana*, 552 U.S. 472, 482–486 (2008) (examining the dialogue between prosecutor and the venireperson as well as other aspects of selection, including the handling of other jurors who offered similar testimony).

124. Interview by the Texas Defender Service with Fred Tinsley, private defense attorney (Sept. 30, 2000), in TEXAS DEFENDER SERVICE, *supra* note 98, at 58. To completely understand this perspective, it is important to mention that judges in Texas, including those on the highest courts, are elected through partisan elections. *Id.*

125. See *Chambers*, 742 S.W.2d 695.

126. Baldus et al., *supra* note 106, at 23–29 (offering studies before and after *Batson* that all point to the decreased representation of Blacks on juries due in large part to discriminatory peremptory challenges).

127. See, e.g., KAUFMAN-OSBOURN, *supra* note 96, at 141–42, 173.

128. *Id.* at 173 (“Arguably today, African American bodies, especially if male, are best able to do so, at least within the confines of the United States. In such cases, the ultimate sacrifice is exacted from persons whose antecedent marginalization marks them as beings whose elimination from the body politic will reconsolidate . . . the dominant collective identity presently under assault by forces the state can no longer contain.”).

African Americans goes beyond the killing of Black bodies to being a constant factor in shaping the very definition of African American citizenship and consequently, their inclusion in deliberative spaces like juries.

IV. *BATSON* HEARINGS IN TEXAS CAPITAL CASES AND THE CONSTRUCTION OF A RITUAL: A DESCRIPTION OF THE METHODOLOGY AND THE DATA

This Article surveys capital cases drawn from the Texas Court of Criminal Appeal (“CCA”), a court whose decisions have been influential in the creation and maintenance of the ritual of *Batson* hearings both within the state of Texas and nationwide. The cases date from 1986—immediately after the *Batson* decision—to 2006. This Article focuses largely on the cases that made it to the CCA for several reasons. First, the CCA is the final arbiter of the correct application of the Supreme Court’s decisions at the state level. Second, because of the number of capital cases adjudicated in this state, Texas courts have an increased opportunity to oversee capital jury selection and *Batson* claims in the context of capital cases. Last, focusing on cases in the CCA allows for analysis of the cases that would be the models for all the lower state courts.

Several cases are not included in this analysis. Many of the early decisions by the CCA involving discriminatory usage of peremptory challenges following the Supreme Court decision in *Batson v. Kentucky* simply worked out the legal reasoning and the mechanics of how a trial court should behave when these objections are raised.¹²⁹ So for example, questions on the proper timing of the objection or the exact make-up of a sufficient record dominate these opinions. Because of the CCA’s concern for the mechanics of this new legal process, the opinions include very little about the jurors themselves or the prosecutors’ reasoning. Cases that were remanded to the lower court for construction of a sufficient record to rule on the *Batson* objections are included upon their return to the CCA. Lastly, some cases are excluded because, although they involved Black jurors, the legal issue centered on another aspect of the venirepersons’ identity, such as country of origin.¹³⁰

129. Many of the cases where the appellant was convicted either immediately prior to or after *Batson* were remanded to the trial court with instructions on how to proceed when these new objections are raised. See, e.g., *DeBlanc v. Texas*, 732 S.W.2d 640, 642 (Tex. Crim. App. 1987); *Keeton v. Texas*, 724 S.W.2d 58, 66–67 (Tex. Crim. App. 1987).

130. See, e.g., *Wamget v. Texas*, 67 S.W.3d 851, 859–60 (Tex. Crim. App. 2001) (upholding the prosecutor’s assertion that venirepersons who were from places where violence was quite frequent like New York City or Liberia could be removed based on geography, despite a bar against removing person strictly because they are naturalized citizens). There may be some connection between geographic exclusion and race but that is outside of the scope of this project.

In the analysis that follows, a prosecutor's reasons offered as race neutral during the *Batson* hearing, any first person statements from venirepersons and objections by the defense council are extracted from the cases with a sufficient record. In some cases, the decisions involved a Black venireperson responding to questions in voir dire followed by the prosecutor's interpretations of the venireperson's response and explanations as to why this response made the person a poor candidate for jury service. The prosecutors' statements are important because they are the street-level agents of the state in the implementation of the death penalty. These interactions in the jury selection process are also of interest to this project because it explores the contemporary dialogue among African Americans and the state about the death penalty and the implications of this dialogue for African Americans' relationship with the post-Civil Rights state.

Noticeably absent from this analysis are judges and their role in these hearings. The argument could be made that the real gatekeepers in the process are judges, while prosecutors and defense counsel merely play their appropriate roles in the adversarial process. In the end it is the judge who decides whether prosecutors' reasons are race neutral. I believe this argument flawed because judges are limited in their ability to referee claims of *Batson* discrimination and other work suggests that if they were not limited, the amount time dedicated to such questions would be limited. This work focuses on the decision-making of an appellate court, but previous studies analyzed the implementation of higher court decisions at the lower court level. In a review of nearly 1700 cases, Feely concluded from the miniscule amount of time spent reviewing constitutional issues in lower courts that "the courtroom encounter was a ritual in which the judge ratified a decision made earlier."¹³¹ Furthermore it is difficult for courts to undertake all the requirements of review outlined in *Batson* and its progeny—particularly the comparative analysis required by *Miller-El*—contemporaneous with the immediate judgments of race neutrality in each individual voir dire.

A. "I Believe in Justice": The Voir Dire Response
of African American Jurors

When asked her views on the death penalty, a juror in the *DeBlanc* responded, "I believe in justice."¹³² This juror's response is interesting because of the particularly heinous nature of the crime in that case—David DeBlanc was convicted of murdering a Catholic Priest in the parish rectory.¹³³ All the African Americans in the venire were removed using

131. MALCOM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 11 (1979).

132. *DeBlanc*, 799 S.W.2d at 711.

133. In March of 2005, DeBlanc's sentence was commuted to life, along with a number of other death row inmates, after the Supreme Court held unconstitutional the

peremptory challenges for similar reasons. There is no prohibition against using peremptory challenges against jurors who oppose the death penalty, however, the consistency with which these reasons are offered to remove Black jurors call into question findings of race neutrality. When asked to articulate their views of the death penalty, the responses of Black jurors fell into two categories: first, they were ambivalent about the death penalty; and second, they were familiar with a defendant. Though they did not all personally know the defendant in the particular case, Black venirepersons had a familiarity with other “defendants,” due to relatives or friends who had been entangled in the criminal justice system. These two reasons reverberate through all the cases.

Across all the cases, African American responses to questioning in voir dire fell into at least one of these categories and, in most cases, drew from both categories. The first and most common response by African Americans when questioned about the death penalty was ambivalence.¹³⁴ The majority of the African American venirepersons in this set of cases expressed feelings ranging from hesitation to opposition to the death penalty. One venireman, who had been an employee of the state corrections system, shared the lingering doubt expressed by Black respondents in the Capital Jury Project, stating that he felt that some of the convicts he worked with “may be innocent.”¹³⁵ He went on to say that African Americans “disproportionately” receive the death penalty, and that then-Governor George W. Bush should have given Gary Graham, a Black man convicted of capital murder whose execution was strongly opposed by many Black and White citizens, a stay of execution.¹³⁶ This venireman was the only one to mention a previous case in explaining his opposition to the death penalty, but was not the only one to mention racial discrimination in capital sentencing as a reason for his hesitation in meting out this form of punishment.

In several cases, the potential jurors based their opposition to the death penalty on religious beliefs. In *Jasper v. Texas*, a venireperson re-

execution of the mentally retarded. Cindy Horswell, *Commutation for Priest's Killer; A 2-Decade-Old Sentence Changes After a Court Finds He is Retarded and Can't Be Executed*, HOUS. CHRON., Mar. 17, 2005, at B1.

134. As this discussion progresses, I want to emphasize that, in analyzing the performative nature of these hearings, it is important to acknowledge that the communicative role of the hearings does not require accuracy, but only the repetition of the narratives that support the agenda of the performer—in this instance, the state.

135. *Simpson v. Texas*, 119 S.W.3d 262, 267 (Tex. Crim. App. 2003).

136. The Graham case was an extremely controversial case that arose in Houston, Texas. Gary Graham became a national symbol of many of the failures of the Texas death penalty regime. See, e.g., Amy Dorsett & Kate Hunger, *Capital Questions: As Execution Date Nears, Proof of Houston Man's Guilt in Slaying Hinges on a Single Witness*, SAN ANTONIO EXPRESS-NEWS, June 11, 2000, at A1A; Guillermo Garcia, *Texas Inmate Struggles to the End: Courts Deny Last Minute Civil Lawsuit*, USA TODAY, June 23, 2000, at 3A; Andrea Greene, *Catholic Group Backs New Trial for Inmate*, HOUS. CHRON., May 31, 1993, at A34.

sponded he could not “play the role of God” and “send nobody [sic], you know, to death.”¹³⁷ Margaret Sanders responded, “God says vengeance is mine.” Additionally, three venirepersons in *Trevino* responded that they objected to the death penalty for religious reasons.¹³⁸ One quoted the Ten Commandments’ prohibition on killing to explain her opinion.¹³⁹ Due to high levels of religiosity among African Americans, political views are often expressed in religious language and attributed to religious beliefs.¹⁴⁰

In *Casarez v. Texas*, the Court distinguished racially motivated removal from removal due to inability to perform juror duties because of religious beliefs.¹⁴¹ In *Casarez*, two Black members of the venire were removed because they were Pentecostals.¹⁴² The defendant made a *Batson* objection, and in the hearing, the prosecutor testified that it was their religion, not their race, that motivated the challenges.¹⁴³ The bulk of the CCA opinion analyzes whether *Batson*, in addition to barring race as a basis for peremptory challenges, also bars removal for religious views.¹⁴⁴ The CCA held that religion was not a pretext for race.¹⁴⁵ The court explains its ruling with the following:

Because all kinds of political, moral, and religious tenets are commonly shared by people of many different races and by those of both sexes, race and sex clearly do not reveal much of anything about a prospective juror’s beliefs. In short, discrimination against race and sex in American history was never based upon the proposition, rational or otherwise, that women and racial minorities subscribe to a disagreeable or undesirable belief system.¹⁴⁶

Public opinion shows that race and religion are, in fact, highly correlative. This rationale is one way in which the law could be informed by the study of public opinion, particularly African American public opinion. Public opinion research also demonstrates that similar religious beliefs can lead to completely opposite policy preferences among respondents of

137. *Jasper v. Texas*, 61 S.W.3d 413, 422 (Tex. Crim. App. 2001).

138. *Trevino v. Texas*, 864 S.W.2d 499, 500 (Tex. Crim. App. 1993).

139. *Id.* at 501.

140. For an exploration of the influence of religion on African American culture and political expression, see generally, e.g., CHARLES HENRY, *CULTURE AND AFRICAN AMERICAN POLITICS* (1990).

141. *Casarez v. Texas*, 913 S.W.2d 468, 498–99 (Tex. Crim. App. 1995).

142. *Id.* at 470;

143. *Casarez*, 913 S.W.2d at 470.

144. *Id.* at 470–80.

145. *Id.* at 471–72.

146. *Casarez*, 913 S.W.2d at 495.

different racial backgrounds.¹⁴⁷ One example of this is the death penalty. Research shows that Blacks identifying as evangelical are more likely to oppose the death penalty than White evangelicals, who are more likely to support it.¹⁴⁸ This research shows that the links between race and religion—as well as other aspects of identity—are highly correlated.¹⁴⁹ As Casarez shows, the procedures created in *Batson* do not adequately disentangle this historical and experiential mix. Thus, removal for religious beliefs can be a proxy for racially motivated removal.

In other cases, the prosecutors used peremptory challenges to remove venirepersons who expressed general opposition to the death penalty due to a variety of concerns. In one case, the venireperson did not believe that he could be convinced that a person convicted of capital murder would commit future acts of dangerousness.¹⁵⁰ This response is important because the Texas statute requires the jury to determine whether the defendant poses a future danger.¹⁵¹ The juror in that case felt that he could not know the answer to this question.¹⁵² Jessie Mae Matthews and Helen Linued, venirewomen in *Cook v. Texas*, did not support the death penalty for a person who was involved in a gun crime, but who did not pull the trigger (“non-triggerman accomplice”).¹⁵³ These venirewomen expressed opinions ranging from reservations concerning the death penalty to opposition to death as method of punishment.¹⁵⁴ In another case, one woman stated “during group voir dire that she would falsify her answers to the special issues to avoid a death sentence.”¹⁵⁵

In addition, prosecutors used peremptory challenges to remove African Americans who supported the death penalty. Venireman Dreannan, in *Morris v. Texas*, responded that he was “strongly in favor of the death penalty,” but he also expressed some uncertainty about particular characteristics of the defendant.¹⁵⁶ Dreannan said he was not sure he could

147. See generally Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 SOC. PSYCHOL. Q. 67 (1991) (analyzing the role of religion in shaping the attitudes of Blacks and Whites toward the death penalty and finding that having had a born-again experience was the only of his five religious variables that impacted death penalty support).

148. See Young, *supra* note 142, at 82–84.

149. See *id.*

150. *Trevino*, 864 S.W.2d at 501.

151. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(2)–(b)(1).

152. *Trevino*, 864 S.W.2d at 501.

153. *Cook v. Texas*, 858 S.W.2d 467, 472 (Tex. Crim. App. 1993).

154. See *id.* See also *Tennard v. Texas*, 802 S.W.2d 678, 681 (Tex. Crim. App. 1990) (describing juror Evelyn Guillory’s reservations and ambivalence about the death penalty and juror JoAnn Smith’s response indicating that she opposed the death penalty and could not vote to impose it and noting her later statement that she could follow the law despite her opposition).

155. *Chambers*, 866 S.W.2d at 25.

156. *Morris v. Texas*, 940 S.W.2d 610, 612 (Tex. Crim. App. 1996).

give the death penalty to someone the defendant's age because he had an eighteen-year-old son.¹⁵⁷ Charles Brooks, in *Camacho v. Texas*, supported the death penalty, but felt the prosecutor was too eager.¹⁵⁸ Another dismissed venireperson in the same case responded, "Although I do not personally believe in the death penalty, as long as the law provides for it, I could assess it under the proper set of facts and circumstances."¹⁵⁹ Both the views of Dreannan and Brooks are within the spectrum of attitudes the Court allows in jurors to be seated.¹⁶⁰ However, in these cases Blacks were removed whether they opposed or supported the death penalty.

Another significant group of African American jurors are those who had an ambivalent relationship with the State. This ambivalence expressed itself in several ways—some had uneasy feelings about law enforcement or the criminal justice system and others knew friends and relatives who had negative experiences with the state. For example, Venireman Vines, in *Johnson v. Texas*, resented cops, who she felt abused their uniforms.¹⁶¹ She also felt that police harassed her twenty-one-year-old nephew because of his race.¹⁶² However, on further questioning, she admitted she was grateful to the police for putting their lives on the line to protect the public.¹⁶³ Margaret Sanders, in addition to her religious objections to the death penalty, also responded that she did not like cops.¹⁶⁴ She also told the prosecutor during questioning, "[S]he did not discuss politics, religion or anything to do with the law."¹⁶⁵

The largest subgroup of venirepersons with an ambivalent relationship with the State consists of those venirepersons whom the prosecutor challenged because of their personal connections, through friends and relatives, with the criminal justice system. The most extreme example is that of Leo Sterling, a venireman in *DeBlanc*.¹⁶⁶ Mr. Sterling's son had been previously tried for capital murder in the same court.¹⁶⁷ The level of offenses—committed by the jurors themselves or by friends and relatives—varied from driving with a suspended license to transporting whiskey in a dry county to a felony with a multiple decade sentence. Typically the venireperson had a brother, nephew or some other male relative who was

157. *Id.*

158. *Camacho v. Texas*, 864 S.W.2d 524, 529–31 (Tex. Crim. App. 1993).

159. *See id.* at 529.

160. *Wainwright v. Witt*, 469 U.S. 412, 424–26 (1985).

161. *Johnson v. Texas*, 68 S.W.3d 644, 649 (Tex. Crim. App. 2002).

162. *Id.*

163. *Id.*

164. *Trevino*, 864 S.W.2d at 500.

165. *Id.*

166. *DeBlanc*, 799 S.W.2d at 712.

167. *Id.*

incarcerated or awaiting trial.¹⁶⁸ For example, Veniremen Earl in *Simpson v. Texas* and Vines in *Johnson v. Texas* both had nephews who were incarcerated in Texas.¹⁶⁹

A link to the criminal justice system ranks second only to ambivalent views on the death penalty as the most frequently cited reason for using peremptory challenges to remove African American jurors. As levels of incarceration continue to increase among African Americans, incarceration rates are not only a factor in abridging the rights of African American felons, but also other African Americans who are connected through filial and social networks. There may be legitimate—or strategic—legal reasons for removing those tangentially connected to the criminal justice system, but these reasons do not negate the consequences on African American citizenship rights and verdicts in cases involving minority defendants. Moreover, the exclusion of African Americans with connections to the criminal justice system also reinforces perceptions of common fate and in turn, increased identification with criminal defendants among African Americans.

B. “More Intuitive Than Rational, So Long As It Is Race Neutral”: Prosecutors’ Interpretations of African American Response in Batson Hearings

In *Sauls v. Texas*, the prosecution removed four African Americans for cause and one with a peremptory challenge.¹⁷⁰ When the prosecutor used his peremptory challenge to remove James Bell, the remaining African American from the jury, the defense counsel raised a *Batson* objection.¹⁷¹ The prosecutor gave the following reasons for removing Bell:

- 1) He was the only man in the pool wearing an earring;
- 2) He was the only man wearing more than one ring that was not a wedding ring; and

168. It is not uncommon in small communities for the jury panel to know—or at least be aware of—the defendant or the prosecutor. Jurors Mosley and Kennedy, in *Chambers*, had incarcerated relatives who had been prosecuted by the prosecutor in the case. *Chambers*, 866 S.W.2d at 24–25. Juror Kennedy was related to a woman whose family rioted at the courthouse and the prosecutor claimed the family continued to hold a “vocal” grudge. *Id.* Similarly, in another case, defense counsel’s father employed one of the African American jurors. *Staley v. Texas*, 887 S.W.2d 885, 898 n.3 (Tex. Crim. App. 1994).

169. *Simpson*, 119 S.W.3d at 267; *Johnson*, 68 S.W.3d at 649.

170. *Sauls v. Texas*, Nos. 05-00-00538-CR, 05-00-00539-CR, 05-00-00638-CR, 2001 WL 406582, at *1 (Tex. Ct. App. Apr. 23, 2001).

171. *Id.*

- 3) He had on a gold medallion surrounded by at least twelve diamonds, which the prosecutor claimed was “an outward manifestation of his liberal tendencies.”¹⁷²

Defense counsel argued that dismissing Bell for wearing jewelry was racist.¹⁷³ According to the defense, young African American men have a propensity to wear “bling.”¹⁷⁴ Furthermore, he argued that “wearing a lot of jewelry is not I think a valid reason to strike someone. But I do know that wearing earrings and gold chains is something that a lot of young African American men do.”¹⁷⁵ Although the CCA found no evidence for the defense’s theory, this case raises an interesting question of how prosecutors’ perceptions of African American members of the venire affect the use of peremptory challenges.¹⁷⁶ Appearance plays a pivotal role in how the prosecutors in these cases construct a race neutral scheme for removing Black jurors.¹⁷⁷

What does a death-qualified, African American juror look like to Texas prosecutors? In *Fuentes v. Texas*, the CCA upheld the removal of five African Americans through peremptory challenges, accepting the prosecutor’s explanation that the jurors did not appear “particularly state-oriented” as a race neutral reason.¹⁷⁸ *Fuentes* demonstrates the way legitimate concern over “the fairness of the justice system” positions African Americans for discretionary removal.¹⁷⁹ Again, it is not only the bodies of Black people, but their collective experience of the criminal justice system and its biases that is turned away from capital juries. In *Chamberlain*, the prosecutor gives “her instincts” as the reason a Black man would not make a good juror.¹⁸⁰ The CCA approved of this reason, saying that peremptory challenges may be more intuitive than rational, so long as they are race neutral.¹⁸¹ The CCA, however, failed to consider the possible connection between the beliefs of legal counsel and racial norms and realities that underlie subjective views of race neutrality.¹⁸² Where the example in *Sauls*

172. *Id.*

173. *Id.* at *2.

174. The word “bling” was chosen because it alludes to a particular kind of aesthetic originally associated with young Black men. This is my word choice, not the court’s. The word “bling” is hip hop slang for expensive jewelry and other flashy accoutrement.

175. *Sauls*, 2001 WL 406582, at *2.

176. *Id.* at *4.

177. Other research has shown the role of nonverbal cues in the jury selection process. See, e.g., Jim Goodwin, *Articulating the Inarticulate: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739 (1996).

178. *Fuentes v. Texas*, 991 S.W.2d 267, 278–79 (Tex. Crim. App. 2002).

179. *Id.* at 278 n.5 (summarizing a statement by an African American juror in the case).

180. *Chamberlain v. Texas*, 998 S.W.2d 230, 236 (Tex. Crim. App. 1999).

181. *Id.*

182. See *Batson*, 476 U.S. at 104–10 (Marshall J., concurring) (suggesting that intuitive beliefs mask racial prejudices).

focused on superficial appearances, the issue of how prosecutors perceive Black jurors beyond their fashion choices is also important in understanding how prosecutors utilize peremptory challenges. Another common justification for removal using peremptory strikes is the prosecutor's perception of the venireperson's social and intellectual abilities. In *Jasper v. Texas*, the prosecutor testified, "he noticed mannerisms demonstrating uncertainty with some answers," but did not offer any explanation of what those mannerisms were or why they rendered the venireperson unfit.¹⁸³ According to the prosecutor in *Staley v. Texas*, Venireperson Calvert "was nervous."¹⁸⁴ She was unable to "follow the law" and, "although Calvert was employed in a restaurant, she expressed no feeling about a capital murder committed in a restaurant."¹⁸⁵ She was "hesitant," "weak willed," and "unable to maintain any opinion in the face of the questioning or challenge."¹⁸⁶ The prosecutor in *Chambers v. Texas* also had a litany of factors that made Venirewoman Cox a bad juror.¹⁸⁷ She was young, unemployed, and had a brother with mental problems, which, by the prosecutor's estimations, made her more sympathetic to the defendant.¹⁸⁸ Also in *Chambers*, the prosecutor "believed [Venirewoman Brown] was intimidated during the individual voir dire and would not then admit the true extent of her opposition to the death penalty."¹⁸⁹ Henry Nichols, according to the prosecutor in *Tennard v. Texas*, had "trouble understanding questions" and was of "limited intelligence."¹⁹⁰ Another venireman in that case was also of "low intelligence," according to the prosecutor, "such that he simply agreed with whoever was questioning him at the moment."¹⁹¹

The most frequent reason offered by prosecutors in the cases analyzed is that the veniremen vacillated on the death penalty. A venirewoman in *Chambers* stated, "I don't think I could vote for the death

183. *Jasper*, 61 S.W.3d at 422.

184. *Staley*, 887 S.W.2d at 898 n.3 (Clifton, J., concurring).

185. *Id.*

186. *Id.*

187. *Chambers*, 866 S.W.2d at 24.

188. *Id.*

189. *Id.* at 26.

190. *Tennard*, 802 S.W.2d at 681. Note the similarities of the prosecutor's assessment of this Black juror's intelligence to the question the Supreme Court grappled with in *Neal v. Delaware* in 1880. 103 U.S. at 390. Though it is clear that race relations have progressed significantly since the latter part of the 19th century, it is not clear that we have reached a point where we can say with certainty race does not impact perceptions of one's intelligence. Fukurai and his coauthors suggest that the view expressed in 1880 continues through the next 100 years in litigation on race and jury participation. FUKURAI ET AL., *supra* note 12, at 81. The history of these cases "reveal[s] an implicit view of blacks as inferior, reaffirmed by the limitations imposed, or the tokenism used, to influence the jury selection process involving black jurors." *Id.* at 81-82.

191. *Tennard*, 802 S.W.2d at 681.

penalty," but later admitted that she could follow the law.¹⁹² In the same case, another Black woman was also said to have "vacillated" about the death penalty.¹⁹³ According to the prosecutor in *DeBlanc*, a venirewoman changed her views depending on whether questioned by prosecution or defense.¹⁹⁴ Joann Smith, in the view of the prosecutor in *Tennard*, "initially indicated that she was opposed to the death penalty and could not vote so as to impose the death penalty," but later she stated that she could follow the law despite her views.¹⁹⁵ In some cases, the jurors vacillated on the level of proof the state would have to mount.¹⁹⁶ For instance, Leo Sterling in *DeBlanc* did not believe in circumstantial evidence. In the same case, Venireman Johnson, according to the prosecutor, required a higher level of proof.¹⁹⁷ Using a peremptory challenge when a venireperson vacillates on the death penalty is problematic because of the Supreme Court's articulation of the rule that people unresolved or uncertain about the death penalty should be included on capital juries, if they can follow the law.¹⁹⁸

The implications of African Americans' familiarity with the criminal justice system discussed above are pronounced in analysis of the prosecutors' explanation for removal. In *Herron v. Texas*, the Court of Appeals upheld a juror strike against a Black venirewoman for both familiarity with "defendants" and vacillating on the death penalty. The prosecutor "discovered through an out-of-court investigation" the basis for its strike and testified that this investigation revealed,

[She] had a reputation at her workplace for being stubborn and close-minded . . . she had confrontations with her supervisors and co-workers. An investigator with the sheriff's office who knew [the venirewoman] advised the State that she "had a chip on her shoulder," that she would likely let race influence her verdict, and that she was not someone they wanted on the jury. The prosecutor also informed the judge that the father of [venirewoman's] children had an extensive criminal record. In fact, [the venirewoman] had been investigated for assaulting that man. Finally, the prosecutor explained that [the venirewoman] apparently had numerous domestic relations problems which indicated a level of instability in her life.¹⁹⁹

192. *Chambers*, 866 S.W.2d at 25.

193. *Id.* at 24.

194. *DeBlanc*, 799 S.W.2d at 712.

195. *Tennard*, 802 S.W.2d at 681.

196. Good examples of this are Tommy Crosby in *Keeton v. Texas*, 749 S.W.2d 861, 864 (Tex. Ct. App. 1987), and James Doyle and Henry Nichols in *Tennard*, 802 S.W.2d at 681.

197. *DeBlanc*, 799 S.W.2d at 712.

198. See generally *Wainwright*, 469 U.S. at 445-47.

199. *Herron v. Texas*, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002).

Based on the subjective view of someone outside of the litigation process, the CCA willingly accepted that this venirewoman was hostile, biased and potentially incompetent. Despite the prosecution's failure to demonstrate that the venirewoman was unfit in voir dire, the court upheld this strike as race neutral.²⁰⁰

In some cases, jurors indicated that they did not want to serve on the jury because they knew the defendant. In *DeBlanc*, several of the jurors knew the defendant or his family intimately.²⁰¹ One venireperson in *DeBlanc* also knew the accomplice witness whom the prosecutor planned to put on the stand at trial.²⁰² The prosecutor challenged the juror because he "felt that anybody who knew [the accomplice] too well would have trouble believing his testimony."²⁰³ In *McGee v. Texas*, Blacks in the community did not want to sit on the jury due to their "familiarity" with the defendant.²⁰⁴ Defense counsel asked one of the Black jurors, "[I]f all the Black people in the community asked to be excused, do you think [McGee] would get a fair trial?"²⁰⁵ The venireman replied:

No, sir, I don't, but only if they didn't know him. If they don't know the people that is involved in it . . . maybe they could do it. But, I mean you know, I been here nearly twenty-six years and I went to the laundromat [with the victim]. . . . And I have seen this man walk around and I just can't do it . . . This is too much on me, Your Honor. It is making me sick.²⁰⁶

Though this may appear at first reading to rebut the argument that prosecutors remove African American jurors due to race but rather remove jurors whose close proximity to crime and victims make them less willing to participate, I would disagree. Since *Strauder*, the Supreme Court has made clear that jury participation, when called and if chosen, is an obligation of citizenship. Allowing Blacks to remove themselves from that obligation because of the difficulty of the task runs counter to the clear principle first articulated in *Strauder* and reaffirmed in later cases. In *Snyder v. Louisiana*, a 2008 case involving race and peremptory challenges, the Supreme Court paid specific attention to prosecutor's use of a peremptory challenge to remove an African American juror who expressed concern that service would interfere with another obligation.²⁰⁷ The Court made

200. *Id.*

201. *DeBlanc*, 799 S.W.2d at 712.

202. *Id.*

203. *Id.*

204. *McGee v. Texas*, 774 S.W.2d 229, 245 (Tex. Crim. App. 1989).

205. *Id.* at 246.

206. *Id.*

207. *Snyder*, 552 U.S. at 475–482. In *Snyder*, the prosecution used a peremptory challenge to remove juror Jeffrey Brooks. *Id.* at 475–76. Defense counsel raised a *Batson* objection. *Id.* at 476. The prosecutors argued that Brooks appeared to be nervous because

clear that even reasons jurors offer themselves to be excused from participation are subject to the comparative review called for in *Miller-El*.²⁰⁸ *Snyder* stands for the principle that the difficulties imposed by jury service do not constitute a race neutral reason for a peremptory strike unless all jurors, regardless of race, are struck for similar reasons.²⁰⁹ Indeed, several of the cases where Black jurors knew the defendant were tried in small communities where it is likely other non-Black members of the community were also familiar with the defendants or the victims.

As we move into the realm of the symbolic and speculative, as much of our understanding of juries and jury service does, the question of whether removing of Black jurors who have contact—intimate or casual—with defendants constitutes a race-neutral reason is an important one. In previous work, I discussed the way in which, not only death row inmates, but Black men generally entangled in the criminal justice system are characterized as kind of Black “Everymen,” making their stories generally familiar to many in the Black community.²¹⁰ If one adds negative interactions with the state through law enforcement—from racially motivated traffic stops to more serious interactions like the imposition of the death penalty—the resonance of such cases orients African Americans to a particular understanding of their relationship to the state. The removal of African Americans for either familiarity with the criminal justice system or hostility to the state and its agents is, most arguably, not race neutral.

V. DECONSTRUCTING THE PERFORMANCE OF THE *BATSON* RITUAL

With the above cases in focus, the utility of peremptory challenges brings us back to the debate started by Justices Marshall and Rehnquist in the cases leading up to and including *Batson*. How does one ferret out impermissible racial motivations and maintain this tool so long a part of the adversarial system? Are judges, at any level, equipped with the interrogatory skill, information, or authority to evaluate the race neutrality of the reasons offered by prosecutors in any case and particularly in capital cases where the racial divide in public opinion is so sharp and well

he feared sequestration, which would take him away from his student teaching obligations. *Id.* Brooks’s concern for his schooling, in the prosecutor’s view, made him more inclined to find for one of the lesser-included offenses, which would take less time to adjudicate. *Id.* The Court found this reason failed the race-neutrality requirement because the prosecutor accepted White jurors who expressed concerns about other obligations more substantial Brooks’s. *Id.* at 481.

208. *Id.* at 476 (“In *Miller-El v. Dretke*, the Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.”).

209. *Id.* at 182–86 (comparing the varying levels of consideration the prosecutor gave to conflicts cited by specific Black and White jurors).

210. See, e.g., Price, *supra* note 30.

measured? These cases demonstrate, I argue, that courts are unable—or unwilling—to intrude to the degree necessary to determine when race is a factor in the use of peremptory challenges. Even if willing, what is considered by the courts to be race neutral is so overbroad and formalistic that it makes the words of the prosecutors an impenetrable veil of discrimination and renders the court ineffective in its stated goal of curing such discrimination within the trial itself. When the words exchanged between the prosecutor and the members of the venire are not helpful in ascertaining meaning, one must look further at other exchanges and actions, as the court did in *Miller-El* and *Snyder*, to decipher the performance that plays out in these hearings.

Since *Strauder*, it is unconstitutional to remove African Americans from juries solely because of race. However, *Batson* hearings and other measures aimed at ensuring juries are selected without racial discrimination laid bare the reality that these efforts have not been successful. The *Batson* hearing can be categorized as ritual because it has become almost mechanical²¹¹ not only in its performance, but also in the court's review of the performance. There is a decipherable pattern to the responses offered by African Americans and prosecutors. Social science research has for decades demonstrated two aspects of African American public opinion important to this research. First, African Americans do not believe that they receive equal treatment under the law. Second, African Americans' belief that they are not treated equally leads to skepticism and to distrust the state's exercise of power,²¹² particularly the exercise of that power through criminal justice polices like the death penalty. There is strong evidence to legitimate this continued skepticism. Prosecutors' unwillingness to accept African American jurors translates to an unwillingness to accept the perspectives African Americans bring to bear in the adjudication of capital cases.²¹³

Underlying every ritual is meaning—symbolic gestures to the instrumental purpose of the ritual. The meaning of symbolic gestures, according to Wuthnow, depends on “its relationship to a set of objective truths, the sincerity of the speakers involved, the degree to which comprehensible language is used and its legitimacy to social norms and circumstances.”²¹⁴ *Batson* hearings are a symbolic gesture towards sanitizing the jury selection process of discriminatory ills such as racism. They are symbolic because they have done very little to prevent the systematic re-

211. WUTHNOW, *supra* note 89 (defining ritualization of behavior).

212. See MICHAEL C. DAWSON, *BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN AMERICAN POLITICAL IDEOLOGIES* 310 (2001).

213. CJP findings show that African Americans are more likely to “cast a vote for life” and that their influence is minimized at times by their small numbers. Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 279 (2001).

214. WUTHNOW, *supra* note 89, at 140.

removal of Blacks by peremptory challenges from capital juries. *Batson* hearings have, however, become a visible presence in capital trials that allow the state to dissimulate continued discriminatory practices. Consequently, the objective truth of the jury selection process is that there is a dearth of African Americans on capital juries. The absence of Blacks from juries does not necessarily equal racist decision making, but systematic removal of Black jurors based on the same patterns—particularly those correlated with race, like incarceration—raises suspicion that Blacks are, or at least are perceived to be, an obstacle to the state's goal of successfully imposing a death sentence. The failure to find such tangible and direct evidence as the manual employed by the Dallas County Prosecutors Office does not mean that such practices do not continue to be a part of the unwritten culture of such offices.

If we accept that the integrity of the criminal justice system requires the setting of some minimal requirements for participation, then the further disparate treatment of African Americans in the use of discretionary tools like peremptory challenges pushes those acts beyond simple institutional racism.²¹⁵ In *Wainwright v. Witt*, the Court held that prospective jurors should only be excluded for cause when their views of the death penalty render them incapable of upholding the oath to follow the judge's instructions.²¹⁶ Following the Court's logic in *Wainwright*, the oath of members of the venire to be truthful about their ability to decide between innocence and guilt and life and death should be sufficient to make the race of the juror and the defendant irrelevant. If the oath is as powerful as the Court suggests, why then continue to use such a problematic legal instrument as the peremptory challenge? Justice Marshall's suggestion that we abandon peremptory challenges altogether appears to be the best course of action if the parties are truly interested in removing race and racism as factors in discretionary challenges.²¹⁷ Additionally, one can push the Court's logic further by acknowledging that prosecutors—as state agents and members of the bar—have multiple codes of conduct that

215. Institutional racism is a term theorized by Carmichael and Hamilton in their canonical civil rights text. STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1967). They define institutional racism as discrimination that "relies on the active and pervasive operation of anti-black attitudes and practices." *Id.* at 5.

216. *Wainwright*, 469 U.S. at 420 (citing *Adams v. Texas*, 448 U.S. 38, 44 (1980)) (noting that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath").

217. *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring). Since Marshall's call for the elimination of peremptory challenges, several other justices have made similar arguments or raised serious questions about whether the current line of decisions will allow for the maintenance of the practice. See, e.g., *Miller-El*, 545 U.S. at 267 (Breyer, J., concurring); *Georgia v. McCollum*, 505 U.S. 42, 60 (1992) (Thomas, J., concurring).

regulate their behavior and require them to make sincere efforts to uphold the law.²¹⁸ Allowing prosecutors, and defense attorneys, for that matter, to disguise racially biased jury selections in a race neutral performance undermines not just the oaths of jurors, but those charged with ensuring the fairness of the process.²¹⁹ Ultimately, it places the process itself into question.

A residual issue when evaluating ritual is whether common language equals common meaning. In each presentation of a performance, the same words and movements are repeated. There may be changes in tone and inflection, but essentially the performances are the same. But, it is not clear that each of the spectators hears and interprets them the same way. The question of different meaning despite common language is significant because a generous reading of the prosecutors' reasons could be that prosecutors use their discretion solely to remove jurors who have connections and opinions unfavorable to their case. This reading makes correlations to race incidental. It is possible that when African American jurors speak, prosecutors hear and see only hostility to the state and its position.

Yet in a pervasively racialized society, it is always possible that the meanings of words differ when filtered through the lens of race. Do you believe in the death penalty? Yes or no? Do you believe in the death penalty for a non-triggerman accomplice? Yes or no? The monosyllabic response solicited by the question does not make meaning simple, but if we look to the prospective jurors' patterns of response, meaning becomes clearer. So for instance, the simple reading of hostility on the part of African Americans could mask a more complicated relationship with the state as both persecutor and protector of Black communities concerned with escalating violence in their neighborhoods—feelings, it should be noted, that could potentially work against defendants in the adjudication of criminal trials. The possibility of inter-racial misinterpretation, particularly in the gray area of discretionary challenges, only adds to the constitutional concerns raised by discriminatory uses of peremptory challenges and the case against the continuation of their use.

Another aspect of ritual significant to *Batson* is that rituals gain legitimacy in relation to social norms and circumstances. This is where a ritualistic understanding of *Batson* hearings is most informative. The death penalty is an area of law where the Court has paid tremendous attention to “community” consensus, but it has not deconstructed the meaning of

218. A good example of a prosecutorial obligation is the requirement that it must notify defense counsel of possibly exculpatory evidence, even if it is detrimental to the state's case. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

219. Prosecutors and defense attorneys are what Amar calls “repeat-player regulars.” Amar, *supra* note 17, at 1178. The regularity of the presence of these figures allows for greater opportunities “to manipulate demographics and chisel an unrepresentative panel out of a cross-sectional venire.” *Id.* at 1182.

community in any way. For the last three decades, watershed capital cases have referenced polls that show the majority of Americans support the death penalty.²²⁰ Truly, the only place where color-blind community exists is in the fictive community constructed in the Court's death penalty decisions.²²¹ The death penalty is legal in thirty-eight states and at the federal level. However, a poll by the Pew Research Center found that forty percent of Blacks favored the death penalty compared to sixty-eight percent of Whites.²²²

Despite significant differences of support among Black and White Americans, the Court continues to speak of community consensus as if the views and the "community" were monolithic.²²³ In fact, the Court's view of an inclusive community obscures the history of the death penalty itself, which was used as a tool to control the behavior of groups who, due to race or other prejudices, were deemed outside of the protected "community."²²⁴ One can point to the high incarceration rates and the disproportionate use of the death penalty against Black and Brown people today to suggest that these legal proceedings take place in a context where race is a factor. One of the conundrums of the criminal justice system, and the reason I use the word ambivalence instead of opposition when characterizing African American public opinion on the death penalty, is that African Americans, especially those in lower socio-economic strata, bear the brunt of under-policing and state crime policy while longing for better, safer communities.²²⁵ *Batson* rituals say that even African Americans

220. A good example of this reliance appears in *Atkins v. Virginia*, when the Court points to polls conducted by news organizations and religious groups to support its view of a community consensus against execution of the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

221. Indeed, recent work on contemporary manifestations of racism argues that Whites' claims of color-blind views of race are a "justification" for continued racial inequality. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 208 (2d ed. 2006).

222. Robert Ruby & Allison Pond, *An Enduring Majority: Americans Continue to Support the Death Penalty*, THE PEW FORUM ON RELIGION & PUBLIC LIFE, Dec. 19, 2007, <http://pewforum.org/docs/?DocID=272> (last visited Oct. 31, 2009).

223. In the end, Wuthnow connects these symbolic expressions as a precursor to ideology. WUTHNOW, *supra* note 89, at 152. Much work has been done in recent years on ideology among African Americans, most notably work like Dawson's *BLACK VISIONS*. See generally DAWSON, *supra* note 212. Dawson's work has helped to reveal the multiplicity of views in Black public opinion. Blacks are not monolithic in terms of ideology. There are, however, significant commonalities in policy preferences. *Id.* This Article takes one step back from ideology to assess the role of race in communicating norms about the meanings of citizenship, community, and the integration of African American policy preferences, in addition to their bodies, in community evaluations of the death penalty.

224. See MARQUART ET AL., *supra* note 33, at 17.

225. The under-policing is evidenced by statistics that show murderers of Black victims receive far less punishment than murderers of other victims. RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 69–75 (1997).

who meet the minimal criteria for participation suffer the taint of criminality and exclusion because of the behavior of other members of their racial community.

Lastly, *Batson* hearings, similar to subsequent appellate processes and the execution itself, have become ritualized steps performed to legitimize the process rather than ensure that verdicts in capital cases represent a just outcome. Understanding the *Batson* hearings as a performance links it to other ways in which the current jurisprudence on the administration of the death penalty focuses more on procedural rather than substantive justice. The view of courts as a protector of a fallible and all-too human process has brought with it routine checks in the process that seem more like quality control rather than real reviews of the behavior of state actors, which often reflect unconstitutional practices. Supreme Court decisions concerning actual innocence in capital cases are a good example of this transition.²²⁶ The Court has separated the underlying question—is the defendant guilty of the crime for which he has been sentenced to death—from the performance of the trial and the question of whether the process was fair. One has to question the utility of such disconnections when, in cases of actual innocence, they fail to prevent or correct wrongful convictions and, in *Batson* violations, they *fail to* prevent or correct impermissible uses of race in jury selection. We are left with the question of what this emphasis on form over substance means for the fairness and justice that are purported to be the foundation of the entire process. This Article argues that the continuation of *Batson* rituals systemically excludes Blacks and their views from the adjudicative process, leaving us with a process that is less fair and just than it could be.

VI. DEATH-QUALIFICATION AS A CONVENIENT MASK OF DISCRIMINATION IN THE *BATSON* RITUAL

Courts' routine acceptance of Black jurors' "vacillation" on the death penalty as a race neutral reason for peremptory strikes requires specific discussion in this analysis. The acceptance of vacillation on the death penalty raises questions because of the rules already in place to evaluate which attitudes about the death penalty disqualify members of the venire for service on capital juries. The requirement that juries be death qualified allows prosecutors to specifically question jurors on their attitudes toward the death penalty. Even when this requirement does not lead to removals for cause, prosecutors use African Americans' previously expressed atti-

226. In *Herrera v. Collins*, the Court makes a distinction between legal and actual innocence. *Herrera v. Collins*, 506 U.S. 390, 398–400 (1993) ("A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. . . . Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.").

tudes about the death penalty as convenient cover for their removal using peremptory challenges. Litigation and research reveal that death-qualified juries are biased towards death.²²⁷ This bias towards death is further distorted by prosecutors' use of attitudes about the death penalty garnered during the voir dire determination of death qualification as the basis for peremptory. As CJP research demonstrates, the mere presence of Black jurors can be as impactful as their perceptions in the difference between life and death.

The Supreme Court spent more than three decades trying to discern the spectrum of attitudes acceptable for participation in a capital jury beyond the basic qualifications for jury service. Early on, the Court confronted the question posed by the vacillation exhibited by the Black jurors by answering the question, "[C]an jurors who oppose the death penalty be excused for cause?"²²⁸ When venirepersons who have "qualms" about the death penalty are removed from capital juries, Justice Stewart posited the jury that remains no longer represents a cross-section of community views.²²⁹ Consequently, simply expressing reservations about the death penalty did not in and of itself constitute cause for removal.²³⁰ This early view of "the community" as the ultimate decision maker in capital cases foretells the Court's increased reliance on some idea of a "community consensus" in more recent decisions.²³¹

227. *Hovey*, 616 P.2d at 1314-41. In *Hovey*, the defendant argued that jurors who would automatically oppose the death penalty in the penalty phase could not be constitutionally excused for cause from sitting in the guilt/innocence phase if they could be impartial. *Id.* at 1301. This forwarded a substantial amount of survey data on deliberations in death penalty cases, including studies on remorse over wrongful convictions, gender and racial disparities, and attitudes toward counsel. *Id.* at 1314-41.

228. In *Witherspoon's* trial, the prosecutor removed half the venire using this statute because they expressed "qualms about capital punishment." *Witherspoon v. Illinois*, 391 U.S. 510, 513 (1968) (using 38 Ill. Rev. Stat. § 743 (1959)). The defendant in *Witherspoon* claimed that the exclusion of jurors with "qualms" about the death penalty resulted in a jury that favored the prosecution and was more likely to find guilt. *Id.* at 516.

229. *Id.* at 519-520 ("A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. . . . Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community.").

230. *Id.* at 522 n.21 ("The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.").

231. For example, in *Witherspoon*, the Court established two essential questions for juries in capital cases: 1) would the juror automatically vote *against* the death penalty without looking at the evidence; or 2) would the juror's views on the death penalty prevent him or her from fairly deciding the defendant's guilt. *Id.* at 522 n.21. This test

The question taken up in *Wainwright v. Witt* is more closely akin to the views expressed by Black venirepersons and the prosecutorial responses in the cases at issue here. In *Wainwright*, the Court addressed the propriety of removing a juror who testified that she had reservations about the death penalty, but would not automatically oppose the death penalty.²³² The Supreme Court addresses the appropriate action when a juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."²³³ The Court was concerned that the language in *Witherspoon* had been taken too literally.²³⁴ The *real* issue, in the *Wainwright* court's view, was whether jurors could do the job. Justice Rehnquist, writing for the majority, argued there was a strong state interest in making sure that the jurors who are finally seated can do what the law requires.²³⁵ Jurors must be able to follow the judges' instructions and obey the oath of service.²³⁶ What survives in the practice of capital jury selection after *Wainwright* is a single question: Can the juror follow the law?²³⁷ All jurors have to be "death-qualified"—meaning they could give the death penalty if the crime in the immediate cases met the legal requirement for the assessment of the punishment—which significantly narrows the spectrum of attitudes of those seated on capital juries.

A year later, the Court was confronted with another capital jury question.²³⁸ Are "death-qualified" juries biased in favor of death during the sentencing phase of capital trials?²³⁹ The Court dismissed empirical evidence that supported the appellant's argument because the studies did not take into account the oath jurors are required to take.²⁴⁰ In the Court's view, the jurors' words bound them to follow the letter of the law, no

essentially allowed all attitudes about the death penalty on the jury with the exception of those on either extreme—complete opposition in all situations or a vote for death in spite of evidence to the contrary. *Witherspoon* advocates an expansive understanding of the community of ideas that can participate in the adjudication of capital cases—an understanding that sentencing a defendant to death, like all punishment, should be at the discretion of a jury that reflects the attitudes and values of the community.

232. *Wainwright*, 469 U.S. at 415. The juror was asked if she had "any religious beliefs . . . against the death penalty." *Id.* She responded that her opposition to the death penalty was "a little personal, but definitely not religious." *Id.* at 415–16. The prosecutor then asked if her feelings would interfere with determining the defendant's guilt or innocence, to which the juror responded that she felt it would. *Id.* at 416.

233. *Id.* at 424.

234. *See id.* at 424–26.

235. *Id.* at 421.

236. *Id.*

237. *Id.* at 419.

238. *Lockhart v. McCree*, 476 U.S. 162 (1986).

239. *Id.* at 168.

240. *Id.* at 171, 192.

matter their personal ethics.²⁴¹ This conclusion on the significance of swearing an oath is quite relevant as we move forward. The frequent acceptance of a prosecutor's justification that Blacks were ambivalent about the death penalty in the cases in this sample suggests that Texas prosecutors and courts do not hold to the Supreme Court's belief in the power of a juror's word. Alternatively, we must accept the opposite assertion mirrored in this logic: That Black jurors—who could not be removed for cause on the same grounds—can be peremptorily challenged for their views on the death penalty because the state questions their ability to fulfill their oath.²⁴²

Death qualification requires jurors to articulate a clear position on punishment.²⁴³ In an effort to balance the state's other interests—impartiality, due process, and prohibiting discrimination based on immutable characteristics—the Supreme Court has been clear about the need to scrutinize jurors' personal and policy views in death penalty cases. This increased scrutiny has resulted, in practice, in further shrinking the jury pool in a way that arguably has important racial implications. First, the death-qualified pool more finely filters for those opposed to the death penalty than those who may have inappropriate levels of support, resulting in a jury pool that is more likely to find defendants guilty.²⁴⁴ Another consequence of these decisions, arguably, is that the prohibition of a broader spectrum of attitudes about the death penalty exacerbates the racial lopsidedness of the attitudes and bodies actually seated on juries. Second, persons who oppose the death penalty are not evenly distributed throughout the population. As a result, African Americans are more likely

241. The studies found that death-qualified jurors were "conviction-prone." *Id.* at 170–71.

242. In answering whether death qualified juries are biased in favor of the death penalty, the Court also suggested that the application of the fair cross-section rule to the death penalty was erroneous. *Id.* at 173–78. The fair cross-section rule, according to Justice Rehnquist, only applies to immutable characteristics (e.g., race and gender), not attitudes toward state policies. *Id.* at 174–175. The state's main concern is seating a jury that will follow the law. *See id.* at 174.

243. *Lockhart*, 476 U.S. at 176. The same year as *Lockhart*, the Court addressed a different aspect of capital juries that is also relevant to this project. In *Turner v. Murray*, the appellant argued that in cases involving interracial crimes—crimes where the defendant and the victim were of different races—counsel should be permitted to ask the jurors questions about their views on race. *Turner v. Murray*, 476 U.S. 28, 31 (1986). Turner, an African American convicted of killing a White shopkeeper, argued that his counsel should have been able to inform venirepersons of the victim's race and ask questions on racial attitudes during voir dire. *Id.* The trial judge dismissed the idea and permitted defense to ask only if the jurors felt they may be biased in some way that would prohibit them from being good jurors. *Id.* The Supreme Court held that the minimal intrusiveness of telling the jury the race of the defendant and victim is overwhelmed by the importance of minimizing the role of race, especially in death penalty cases. *Id.* at 37.

244. *See Hovey*, 616 P.2d at 1314–41 (discussing studies of the Witherspoon death qualification requirement and conviction prone-ness in capital juries).

to be disqualified from service based on attitudes toward the death penalty.²⁴⁵ Not only are African Americans the object of prosecutor bias, but also poor people, the less educated and certain religious groups.²⁴⁶

VII. THE ARGUMENT AGAINST PEREMPTORY CHALLENGES AND ITS RITUALS

*"If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause would be but a vain and illusory requirement."*²⁴⁷

In criminal trials, the jury is the place where individual identities and values negotiate with the State over appropriate behavior and appropriate punishment. Peremptory challenges are a long tradition in litigation, but so is racial discrimination in the use of peremptory challenges. How courts could construct rules that would minimize the role of race in the use of peremptory challenges and maintain the practice is unclear. The prediction by Justices Marshall and Rehnquist of the difficulty of these endeavors is born out in the litigation and the practices that followed.

The repetition of *Batson* hearings with little vindication of the rights of Black citizens makes a strong case for reading them as little more than performance. Studies commonly point to the disproportionate representation of Black men on death row without acknowledging that the presence of Black men in other parts of the processes has important effects as well. Moreover, reading these hearings as ritual demonstrates the way administration of the death penalty and discrimination within that administration has implications for the entire African American community. African Americans are ambivalent about the death penalty largely because they are ambivalent about their relationship to the state and the state's ability to be fair and impartial in cases involving not just Black defendants but most interactions between the state and African American citizens. By thinking about the way that these other early processes communicate the relationship between African Americans and the state, the implications for the larger Black community are clearer.

As the Supreme Court itself suggests in the *Batson* quote that is the epigraph for this part of the Article, how do we ensure that the requirements of the Equal Protection Clause are neither "vain" nor "illusory?" The best way to ensure that the equal protection concerns these challenges give rise to are not violated is to remove them altogether. Cleansing capital trials of racial entanglements is difficult, particularly trials with Black defendants. Maintaining components that do not serve the

245. See, e.g., Baldus et al., *supra* note 10.

246. *Id.* at 15.

247. *Batson*, 476 U.S. at 97–98 (citing *Norris v. Alabama*, 294 U.S. 587, 598 (1935)).

ultimate goal of the fair deliberation of evidence and assessing punishment only undermines the attempts to distinguish the current death penalty regimes from those of the past.

In *Miller-El*, the Supreme Court provided specific guidance to lower courts on analyzing voir dire transcripts and statistical evidence. Each of the cases on peremptory challenges creates a new primer for how courts can or should analyze these claims. More than twenty years after *Batson v. Kentucky*, it seems increasingly clear that either the Supreme Court cannot construct an adequate process for dealing with racial discrimination in peremptory challenges or lower courts are unable to implement the primer or both. The need to reaffirm and readdress this particular aspect of litigation practice, particularly in capital trials, suggests that *Batson* hearings, originally intended to be a remedial measure against discrimination, are no remedy at all.

The very state that gave rise to *Batson v. Kentucky* still found it necessary to single out peremptory challenges in a new study of the same county where the case arose some twenty years later.²⁴⁸ The Kentucky Supreme Court, as part of a larger initiative to assess racial fairness in the state court system, convened an interdisciplinary panel of judges, lawyers and civic leaders to report on a series of topics including the jury process. In its recommendations, the Chief Justice Racial Fairness Commission urged less reliance on peremptory challenges and more substantive evaluations of the justifications offered by litigants.²⁴⁹ In addition to its recommendations, the Commission also “discussed at length” the value of peremptory challenges and, more than two decades on from *Batson*, were “strongly” divided along similar lines as Justices Marshall and Rehnquist.²⁵⁰ The report concluded its discussion on peremptory challenges with the following: “The Commission was split with no clear majority on recommending reduction, elimination, keeping the number peremptory challenges allowed as they currently exist, or even increasing

248. Louisville is the largest city in the state and by significant numbers the most diverse. U.S. Census Bureau, State and County Quick Facts: Louisville/Jefferson County (Balance), Kentucky, <http://quickfacts.census.gov/qfd/states/21/2148006.html> (last visited Feb. 9, 2009). Although Blacks only represent 7.5% of the statewide population, they make up thirty-three percent of the population of Louisville. *Id.*

249. In the fall of 2008, the commission made the following recommendations:

1. Examine the use of peremptory challenges available to litigants, and provide training to prosecutors, defense counsel, and judges that promotes representative juries.
2. Automatically require a race-neutral justification whenever a prospective juror is stricken, or whenever a racial minority is stricken.
3. Modify the legal standard by which judges assess *Batson* challenges to heighten the justification requirements for removing a juror.

CHIEF JUSTICE RACIAL FAIRNESS COMMISSION, CHIEF JUSTICE’S COMMISSION ON RACIAL FAIRNESS IN THE COURTS REPORT ON JURY PROCESS 8 (2008) (copy on file with author).

250. *Id.* at 6.

the number; however there was consensus that the topic bears further consideration by the Kentucky Bar Association.”²⁵¹

The Kentucky Supreme Court should be lauded for its willingness to look honestly at its own practices and the practices of those who appear before it and the initiative and its recommendations further point to the continuing problems associated with *Batson* hearings. Though this Commission did not have a clear majority, I suggest their failure to reach consensus only further supports the argument against the use of such a divisive and discriminatory litigation tool.

Some may react to the suggestion to do away with peremptory challenges with shock similar to those early reactions to Paul Butler’s arguments in favor of jury nullification as a cure for racist policy and decision making in other parts of the criminal justice system.²⁵² What is similar in these works is the call, when the system is significantly broken, to ask for decisive and drastic repair. Like Butler, I am also concerned about the way in which race has so permeated policy and legal arenas. This Article asks where we can excise components of the criminal justice system that are used to target members of specific communities, should it not be done. Mostly, this Article highlights the continued concerns about the feasibility of constructing selection practices in capital cases that will eradicate racial discrimination in peremptory challenges.²⁵³ The analysis and suggestions offered in this Article are simply more evidence in support of Justice Marshall’s argument that the removal of a practice with the “inherent potential . . . to distort the jury process by permitting the exclusion of jurors on racial grounds” is not “too great a price to pay” in the efforts at fairness and justice.²⁵⁴

There is a counter argument to that outlined in this Article, that peremptory challenges also help criminal defense lawyers, who, with the same prohibited motivations as the state, shape juries in a manner favorable to them and their clients. My response is a relatively simple one. Turnabout is not fair play in violations of the Constitution. Contrary to the argument Justice Rehnquist makes in dissent in *Batson*, we have not seen the cancelling effects of discriminatory uses of peremptory challenges.²⁵⁵ Blacks continue to be disproportionately targeted for removal in capital cases, and peremptory challenges are the main weapon in prosecutors’ arsenal. Because criminal defense attorneys are not representatives of the state, the Court has focused less attention on their behavior. This inattentiveness does not, however, allow criminal defense lawyers to act outside of the bounds of the Constitution. If the juror challenges were

251. *Id.*

252. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 712 (1995).

253. See *Batson*, 476 U.S. at 102 (Marshall, J., concurring) (articulating this concern).

254. *Id.* at 108.

255. *Id.* at 112.

restricted solely to for cause challenges, both prosecutors and defense attorneys would be required to more vigorously interrogate jurors, as well as to more clearly state their reasons for removal, to ensure that jurors are removed for legitimate reasons and not because of race.

CONCLUSION

This research lays out an argument for altering the current view of peremptory challenges and their utility in the adjudication of capital trials. The maintenance of such instruments, despite quantitative and qualitative evidence of their use in violation of the Constitution, forces the question, "To what end do we allow their continuation?" These cases and the lack of clarity on how to remedy racial discrimination in the use of peremptory challenges have led us to repeat performances of a hearing which is inadequate in its attempts to do just that. *Batson* hearings at their inception appeared to be an innovative approach in providing real-time solutions to racial discrimination. Like some innovations, time and experience signal their failure and need to be scrapped for newer, bolder, and stronger measures. This analysis urges that the appropriate measure is the removal of these challenges from a process already fraught with concerns of discrimination and bias.

Implicit in this work is a next question suggested by failure to correct juror error in these and other cases. Have the court concerns over fair process for the defendants moved too far away from the early reasoning in *Strauder* that viewed discrimination in the jury process as a denial of one of the fundamental aspects of citizenship for African Americans? The focus on fairness to defendants may be obscuring other problems critical to the question of racially discriminatory challenges of Black jurors. Later work will pursue this question, but as the research discussed in this Article suggests, the answer as to whether this tool—peremptory challenges—infringes on the rights of African American citizens may be a foregone conclusion.